MSI Journal of
Arts, Law and Justice (MSIJALJ)

HOW TO HARNESS THE JURIDICAL EFFICACY OF DISSENTING JUDGMENTS OF MULTIPLE PANEL APPELLATE COURTS IN NIGERIA

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The authors declare that no funding was received for this work.

OPEN ACCESS

Received: 01-November-2025
Accepted: 20-November-2025
Published: 23-December-2025

This article is published by **MSI Publishers** in **MSI Journal of Arts, Law and Justice (MSIJALJ)**
ISSN 3049-0839 (Online)

The journal is managed and published by MSI Publishers

Volume: 2, Issue: 12 (December-2025)

ABSTRACT: Contrary to lay thinking, "dissenting judgments" are not utterly useless in the adjudicatory ecosystem in Nigeria. To provide clarity on the importance of dissenting judgments, this paper analysed the composition and mode of operation of the "Supreme Court" and "Court of Appeal" as multiple panel appellate Courts. The paper established that by law, their composition requires that these Courts must sit in panels and that where there is a split decision, the decision of the majority holds sway. The paper further established that a minority judgment of the Court of Appeal may be upheld at the Supreme Court after quashing the majority judgment of the Court of Appeal. However, the "minority judgment of the Supreme Court" remains not binding in perpetuity and it is no use relying on them or citing them as binding precedents in lower Courts. However, to harness the jurisprudential efficacy of dissenting judgments, it was recommended that the legislature should be reactive to issues raised in dissenting judgments so that in deserving cases, they are used to either amend, abrogate or enact new laws to suit the concerns raised therein for the progressive development of the law.

Keywords- *dissenting, judgment, majority, minority, panel.*

1.0 Introduction

The Nigerian constitutional order recognizes that some Courts will sit as panel Courts of more than one Judge or Justice. The superior Courts directly affected in this paper are the "Supreme Court" and the "Court of Appeal". Judgment of such a Court sitting as a panel may not be unanimous thus throwing up the question of how the decision of such a panel Court is determined. In other words, is it the majority judgment or minority judgment that is the judgment of the Court? Of course, it is logical that this is determined by the majority decision. Nevertheless, it is also allowed that some minority panel members may not agree with the decision of the majority either on the whole issues or a part of the issues submitted for adjudication. It is against this background that this paper evaluates the juridical value of a "minority decision" otherwise called "dissenting judgment" given in either the "Supreme Court" or "Court of Appeal". In conclusion, the paper recommended plausible ways in which a dissenting opinion, judgment or decision of a panel Court may be revived under Nigerian constitutional order and law. For ease of comprehension, the paper is further divided into the following segments namely: Composition and mode of operation (modus operandi) of Panel Courts in Nigeria; Types of judgments of a panel Court and binding judgment of a panel Court; Judgment of the multiple panel appellate Court is the majority judgment; Effect of a minority or dissenting judgment in the Court of Appeal; Effect of dissenting Judgment in the Supreme Court; Harnessing the jurisprudential efficacy of dissenting judgments; and Conclusion.

2.0 Composition and mode of operation (modus operandi) of Panel Courts in Nigeria

The "Supreme Court" and "Court of Appeal" are the only two superior Courts created under the national Constitution that are expressly required to sit in panels.[i] The Election Petition Tribunals and Appeals therefrom also sit as Panel Courts although their composition and mode of operation are outside the direct focus of this paper. With respect to the constitution or composition of the "Supreme Court", it is

provided under *section 234* of the Constitution of the Federal Republic of Nigeria,[ii] 1999 as amended that

> For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any Law, the Supreme Court shall be duly constituted if it consists of not less than five Justices of the Supreme Court: Provided that where the Supreme Court is sitting to consider an appeal brought under *233(2)(b) or (c)* of this Constitution, or to exercise its original jurisdiction in accordance with *section 232* of this Constitution, the Court shall be constituted by seven Justices.

Thus, the composition of the Supreme Court is either a Panel of five Justices or a Panel of seven Justices depending on the nature of the appeal before it. The above constitutional provisions that the size of panels of the Supreme Court changes according to the subject-matter under consideration does not suggest superiority of a seven-man panel over panels having five Justices. Any attempt to rank decisions of the Supreme Court has no legal or constitutional basis In *Arusi & Anor v Agwu,*[iii] it was correctly held that "Each decision of the Supreme Court is a decision of the Supreme Court and except for academic purposes, it is beyond lower Courts to make distinctions based on the numerical sizes of the Supreme Court panels which handed down the decisions."

On the other hand, for the "Court of Appeal", *section 247* of the CFRN, 1999 as amended, provides that "(1) For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any other law, the Court of Appeal shall be duly constituted if it consists of not less than three Justices of the Court of Appeal and in the case of appeals from -(a) a Sharia Court of Appeal if it consists of not less than three Justices of the Court of Appeal learned in Islamic personal law; and (b) a Customary Court of Appeal, if it consists of not less than three Justices of Court of Appeal learned in Customary law." Simply stated, it stands to reason or connotes that

"the minimum number of justices to constitute a panel of the Court of Appeal is three."[iv]

In a multiple panel appellate Court like the Supreme Court and Court of Appeal or even the Election Petition Tribunals, there is autonomy of opinion or decision meaning that each Justice is at liberty to reach his own independent decision on any appeal presented before him in a Panel as he considers legal, fair, just and equitable. No Justice is bound to agree with the reasoning or decision of his brother Justice or Justices on the panel. Dissenting opinion or decision is constitutional as it finds support in *section 294(2)* of the CFRN, 1999 as amended which enacts that "Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion: Provided that it shall not be necessary for the Justices who heard a cause or matter to be present when judgment is to be delivered and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing."

3.0 Types of judgments of a panel Court and binding judgment of a panel Court

Owing to the composition a Court that sits as a panel, there may be "unanimous judgment", meaning that all members of the Court are agreed on the decisions and findings. There may also be "dissenting judgment" or "split judgment" or "split decision" meaning that there is no unanimity on the judgment delivered or decision reached either in part or whole. This means that there is at least one dissent. Hence, there is "majority judgment" and "minority judgment". As noted earlier, *section 294(2)* of the CFRN, 1999 as amended provided the authority to write "dissenting judgment". Without prejudice to the discussion in the segment below, it should be accentuated ahead that "the binding judgment of the Court is the majority judgment". It is made abundantly clear under *section 294(3)* of the CFRN, 1999 that "A decision of a court consisting of more than one Judge shall be determined by the opinion of the majority of its members."

4.0 Judgment of the multiple panel appellate Court is the majority judgment

It requires to be reiterated that the law is that "the judgment of the Court is the majority judgment and it is the binding judgment. A dissenting judgment is not a

binding judgment of the Court." under *subsection 3* of *section 294* of the CFRN, 1999, "A decision of a court consisting of more than one Judge shall be determined by the opinion of the majority of its members." In *Oni & Anor v Oyebanji & Ors,*[v] Saulawa, JSC, underscored this point when he held among other things as follows:

> ... At this very crucial point, I have deemed it expedient to reiterate, for the avoidance of doubt that the whole essence of the dissenting views so eloquently postulated in the dissenting judgments of the three Justices (coram Peter-Odili, Eko and Saulawa, JJSC) was merely advisory, thus not binding on the parties. The term 'dissenting opinion' denotes a view expressed by one or more Judges who tend to disagree with the decision reached by the majority in a given appeal. Also termed 'dissent' or 'minority opinion'. See *Black's Law Dictionary* 11th Edition, 2019 @ 504 - 505. Thus, a dissenting opinion is not meant to disparage or degrade in estimation the majority decision of the Court. This is absolutory so, because a dissenting judgment or opinion, no matter how eloquently powerful, learned, or articulate, is not binding on anybody, thus cannot by any stretch of imagination serve as the judgment of the Court. Undoubtedly, the judgment of the Court is the majority judgment or decision.

Furthermore, Tobi, JSC, put it tersely in *Umanah v Attah & Ors*[vi] when he held that "The law is elementary that a minority judgment, as the name implies, is not the judgment of the court. The judgment of the court is the majority judgment." Thus, dissenting judgment cannot be the subject of appeal by the appellant. An appellant can only appeal against the majority judgment. Against this backdrop, it was held in *Modibbo v Usman & Ors*[vii] that "It is trite that the judgment of the multiple panel

appellate Court is the majority judgment or opinion. A minority or dissenting judgment therefore should not be the subject of the Appellant's appeal or argument".

5.0 Effect of a minority or dissenting judgment in the Court of Appeal

The effect of a dissenting or minority judgment of the Court of Appeal requires special consideration. By reason of the grading of Courts in Nigeria, appeals lie from the "Court of Appeal" to the "Supreme Court". Except in election petitions for State Assembly and National Assembly that terminate at the Court of Appeal, vast majority of cases on appeal terminate at the Supreme Court. thus, where therefore there is "a minority or dissenting judgment" in the Court of Appeal, it may or may not be the end of the road subject to the judgment being appealed. Thus, where an appeal is lodged to the Supreme Court from the judgment of the Court of Appeal, the minority or dissenting judgment may be dismissed or discountenanced and the majority judgment further upheld. On the flip side, a dissenting judgment of the Court of Appeal may be upheld on appeal to the Supreme Court and the majority judgment of the Court of Appeal quashed or upturned. Instances abound, where some majority judgments of the Court of Appeal, have been set aside by the Supreme Court, and approval is given to a minority judgment of the Court of Appeal which reflects the justice of the case on appeal.[viii]

Furthermore, in *Egbuta & Anor v Elekwachi & Anor,*[ix] it was emphasised that

> Circumstances may however arise where in the determination of an appeal, the majority judgment may be set aside, while the minority judgment which reflected the justice of the case may be approved. Aside that instance, a minority judgment should not be the subject of argument or appeal. Counsel should therefore not rely on or resort to a minority or dissenting judgment in arguing their appeal. See *P.I.P. Ltd v Trade Bank (Nig) Plc* (2009) 13 NWLR (Pt. 1159) 577; *O.S.I.E.C v A.C* (2010) 19 NWLR

(Pt. 1226) 273 and *Olufeagba v Abdul Raheem* (2009) 18 NWLR (Pt. 1173) 384.

6.0 Effect of dissenting Judgment in the Supreme Court

Contrary to the fluid position with respect to effect of dissenting judgment in the Court of Appeal, conclusively, a dissenting judgment in the Supreme Court has no binding effect as is the "final Court". Counsel are advised not to rely on or resort to a dissenting judgment irrespective of the Court that gave it. In *Orugbo v Una*,[x] it was a copiously decided that

> To start with, it is well settled that a dissenting judgment, however powerful, learned and articulate, is not the Judgment of the Court; the judgment of the Court is the majority Judgment, which is the binding judgment". To drive home this point, in *FGN v Zebra Energy Ltd*,[xi] Mohammed, JSC, stated as follows that "I am not unmindful of the Judgment of Ogundare, JSC, in Ibrahim's case [I.e. Ibrahim vs. J.S.C. Kaduna State [supra], wherein he considered the applicability of contract cases to the privilege provided in the Act. But that is a dissenting Judgment and although well founded, is not the binding decision on the issue."

Majority judgment of the Supreme Court is the final and binding decision. *Section 235* of the CFRN, 1999 as amended settled the finality of decision of the Supreme Court when it provided that "Without prejudice to the powers of the President or of the Governor of a State with respect to prerogative of mercy, no appeal shall lie to any other body or person from the determination of the Supreme Court." As held in *Adigun & Ors v Governor of Osun State & Ors*,[xii] "The finality of the decisions of the Supreme Court in civil proceedings is absolute unless specifically set aside by a later legislation. The justices that man the Court are of course fallible but their judgments are, as the Constitution intends, infallible. Therefore, any ingenious

attempt by counsel to set aside or circumvent the decision of the Supreme Court will be met with stiff resistance."

7.0 Harnessing the jurisprudential efficacy of dissenting judgments

Granted that a dissenting opinion "does not amount to a binding decision of the Court", it does not mean that such a dissent should be taken lightly or disparaged. In the notorious case of *Ifezue v Mbadugha,*[xiii] the majority decision[xiv] was opposed in the dissenting opinion of Bello, JSC (as he then was). This dissenting opinion contributed in no small measure in the insertion of *subsection (5) of section 294* of the Constitution of the Federal Republic of Nigeria, 1999 as amended now requiring that "the decision of a Court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of *subsection (1)* of this Section unless the Court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof." As the general principle is that "the Courts do not make laws", the appellate Courts in Nigeria are thus encouraged in deserving cases to render forceful and activist dissenting judgments that will later lead to amendments in the law or policy changes.

On the flip side, the Nigerian legislature is expected to be reform oriented as well as reactive to issues raised in dissenting judgments so that they do not remain mere "personal" disagreements with the majority without legal consequences". A dissenting judgment, no matter how courageous or brilliant, has no binding force of law except where there is legislative intervention to either amend, abrogate or enact new laws.

8.0 Conclusion

A dissenting judgment should not be scoffed at as it preserves autonomy of thinking, independent reasoning and decision of judicial officers. Writing a dissenting judgment does not also mean that the judge concerned knows or understands the law better than his colleagues holding the majority view. It only shows a difference of approach to a common issue. As demonstrated in this paper, instances abound where dissenting judgments have led to legislative amendments. However, writing

dissenting judgments should not be for the fun of it. In sum, Oguntade, JSC, admirably explained when and why "dissenting judgments" are delivered in an "appellate Court" as follows:

> In deciding to write a dissenting judgment, the first thing a judge considers is whether or not the conclusion on law or fact as pronounced in the majority judgment is in accord with the law of the land or a binding judicial precedent or does justice to one or the other of the parties on the case made by them. Another case is where the judge concerned persuades himself that a greater justice or fairness will be done in a case by departing from an otherwise binding judicial precedent. Further, in a case which revolves around the interpretation or application of a statutory provision, the dissentient judge may form the opinion that there is a better method to do justice in a case than the adoption of the interpretation adopted in the majority judgment. There are often instances where the necessity to write a dissenting judgment may arise from the inference of fact or law drawn from a primary position.
>
> The necessity to write dissenting judgment arises in all situations where a dissentient judge forms the impression that the ends of justice will be better served by following an approach different from that stated in the lead judgment. Writing a dissenting judgment does not connote that the judge concerned knows or understands the law better than his colleagues holding the majority view. It only shows a difference of approach to a common issue. This is

a situation that regularly recurs in the appellate courts.

The occurrence does not weaken the bond of camaraderie between the appellate judges. Indeed, it expands the frontiers of knowledge and shows the vibrancy and development of the judiciary concerned. The question whether or not a judge writing a dissenting judgment is making the law raises the question of the acceptability of the reasoning espoused in the dissenting judgment by succeeding legal scholars and judges. When you write a dissenting judgment, you are making a contribution to legal learning and thought. The acceptability in the future of such contribution depends on many imponderables. But it is undoubted that legal scholars will have cause to examine and evaluate the depth of the reasoning embedded in a dissenting judgment and may propagate the acceptance of the minority over the majority judgment. Put simply, I would say that the potency of a dissenting judgment is a matter for the future and depends on the direction which legal learning and experience dictate in the future.[xv]

REFERENCES

[i] *Section 6(5)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended contains the list of superior Courts.

[ii] Hereinafter abbreviated and referred to as "CFRN".

[iii] (2023) LPELR-59638(CA)

[iv] Per Kalgo, JSC, in *Ubwa v Tiv Area Traditional Council & Ors* (2004) LPELR-3285(SC) (Pp. 9 paras. F-F). section 9 of the Court f Appeal Act, 2004 as amended contains similar provision about a minimum of three Justices constituting the Court of Appeal. A full Panel of the Court of Appeal consists of five Justices of the Court of Appeal. Note however that in *INEC v Advanced Congress of Democrats (ACD) & Ors* (2022) LPELR-58824(SC) (Pp. 32-33 paras. D), it was held that "Both *section 9* of the Court of Appeal Act, 2004 and *section 247(1)* of the 1999 Constitution as amended, merely provide that the Court of Appeal "shall be duly constituted if it consists of not less than three Justices of the Court of Appeal" ... There is no express provision to the effect the 5-man panel shall be the Full Court of the Court of Appeal. No provision of either the Court of Appeal Act or the constitution prohibits or proscribes the 5 - man panel. Therefore, in line with the trite principle of interpretation or construction of statutory provisions: what is not expressly prohibited is impliedly permitted."

[v] (2023) LPELR-60699(SC) (Pp. 88-94 paras. B).

[vi] (2006) LPELR-3356(SC) (Pp. 25-26 paras. G)

[vii] (2019) LPELR-59096(SC).

[viii] In the case of *Bank of Baroda v Iyalabani Ltd* (2002) 7 SCNJ 287, all the findings made or the reasoning and conclusion in the dissenting Judgment of Ayoola, JCA (as he then was) was which approved on appeal by the Supreme Court. See also *Olufeagba & Ors V Abdur-Raheem & Ors* (2009) LPELR-2613(SC) (Pp. 73 paras. A).

[ix] (2013) LPELR-20666(CA) (Pp. 42-43 paras. C-C).

[x] (2002) 16 NWLR (pt. 792) 175 SC.

[xi] (2002) 18 NWLR (pt. 798) 162 SC.

[xii] (1995) LPELR-178(SC) (Pp. 29-30 paras. C).

[xiii] (1984) LPELR - 1437 (SC).

[xiv] Coram: AG. Irikefe, A. O. Obaseki, K. Eso, A. N. Aniagolu, A. Nnamani, and M. L. Uwais, JJSC).

[xv] G Oguntade, JSC, "Dissenting Judgment and Judicial Law Making",

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