

Performatives Used In Kenyan Courtroom Discourse

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Abstract

This study investigated performatives used in Kenyan Courtroom Discourse. It identified the performatives used in the courtroom proceedings. Performatives are verbs used in courtroom discourse for purposes of disputing, directing, requesting, declaring, confessing, expressing, promising or denying allegations among other functions. In this paper, performatives used in Kenyan courtroom interaction are identified using excerpts of examination and cross-examination sequences derived from civil and criminal cases. The paper was based on the assumption that conversation in courtroom uses performatives which are prevalent and specific to court as an institution. The objective was: To identify performatives used in the courtroom proceedings. The research question was: What are the prevalent performatives used in courtroom conversation? The study used Speech Act Theory proposed by Austin (1962) and refined then advanced as a theory of discourse by Searl in 1969 and Critical Discourse Analysis Theory by Fairclough (1992). It used 32 court cases collected through tape-recording and non-participant observation. The tape-recorded data were transcribed using Jefferson transcription notation stated in Levinson (1983:369-370). Critical Discourse Analysis by Fairclough (1972) and Conversational Analysis by Hymes (1972) were used in the analysis. The illocutionary structures in the speakers' utterances against the perlocutionary structures in the respondents' utterances were analyzed to establish the differences. Findings of the study indicate that performatives such as declaratives, directives, requests, denials, confessions, disputations, and expressive are prevalent during courtroom conversation. They entail speaker's intention on the listener. These were observed in question-answer exchanges, which are interpreted as indirect speech acts (Kryk-Kastovsky 2009:440). The indirect address presents the interactional rules of engagement in courtroom discourse. This prohibits the usual, natural and dynamic reply to questions as conducted in casual and non-institutional conversation. Due to this, the study concluded that speech in courtroom use performatives which are prevalent and specific to courtroom discourse. Finally, the study recommends First, that Kenyan citizens should form a habit of visiting the law courts so as to familiarize with the performatives used in courtroom conversation. Secondly, that forensic linguistics be introduced in education syllabus to equip the public and the young citizens with the necessary knowledge for courtroom interaction.

Key words: Performatives, Forensic Linguistics, Courtroom, Prevalent, Perlocutionary, illocutionary, Critical Discourse Analysis, Cooperative Principle, Conversational Analysis.

1. Introduction

The court structure is a law enforcement mechanism whose role is to provide justice to the people. It is the duty of the parliament to pass necessary laws and the judiciary to administer them fairly and effectively through established structures. The presence of the courts is premised on the rule of law exemplified by the constitutionalism, absoluteness of law and equity before the law. The constitution and the statutes have established the courts. Performatives are verbs that refer to the saying of words, which constitute the performing of an act. This is the use of words to do things. They are the basic linguistic forms which are used in courtroom talk. This paper notes that during the court proceedings, performatives are used in both direct and cross-examination strategies, in terms of both lawyer's questions and responses of witnesses. They provide the discursive nature of courtroom conversation. Performatives are also used by the judge to control, moderate talk produced by all the other participants and to pass judgements. The concept of performatives observed in this study show the role of speech acts. Speech acts and the law are made of much the same components. Pragmatic concepts such as authority, verifiability and obligation are basic to both (cf, Hencher 1980:254).

Courtroom discourse consists of illocutions (actions performed by producing utterances) and perlocutions (actions performed as a result of the produced utterances). Austin's (1992) concept of illocutionary acts state that by uttering a sentence the speaker is simultaneously performing an act. The study realized that this is carried out by both the judicial and non-judicial participants during court proceedings.

2.0 Literature Review

Previous studies on courtroom discourse encountered have concentrated on communication difficulties due to lack of efficient interpretation services (Odhiambo 2000), Legal language use (Okeiga 1998), Translation incompetence (Ali 1981), Communicative clash between Aboriginal English and the legal system (Eades 1993 and 1994) and Speech Acts in Early Modern English court trials. (Kastovsky 2009). This study is different in that it sought to identify specific performatives prevalent in Kenyan courtroom discourse. In doing so, the study demonstrates uniqueness of courtroom discourse in its dynamic properties in comparison to other similarly power – asymmetric institutional environments such as classroom, work place and the doctor's surgery (Cotteril 1993:105).

2.1 Performatives and Legislation

Tiersma (1993:131) posits that “much of what we call law arguably consists of legislative speech act “This means that performatives and legislation are closely related. Practices in the legal system such as seen in courtroom conversation or written documents have their pragmatic properties reflected in their performative character and every legal system contains rules productive of legal effects by the very act of being uttered (Kryk-Kastovsky 2009:440).

2.2 The Legal and Linguistic Disadvantage

The laws and protocols used in courtroom discourse are only familiar to the judicial courtroom participants such as the judges/magistrates, prosecutors and advocates. The non-judicial participants like the accused, witnesses and the complainants are not accustomed to such an environment. They are at a disadvantage both legally and linguistically. Their everyday casual conversational rights of equal access and free negotiation of turns and turn-types are suspended. They have no control over the talks of the other participants and only a very limited control over their own contributions.

3.0 Methodology

The study used Non- participant observation and Tape-recording methods to collect data.

3.1 Non-participant observation

This noted paralinguistic features such as gestures, hesitations and facial expressions. These were techniques of verbal cruelty, persuasiveness, beliefs/disbeliefs, agreements and disagreements that could not be captured in tape- recording.

3.1.2 Tape-recording

Discourse between the judge/magistrate and prosecutor, accused, witness or complainant were collected. A total of 32 cases were tape-recorded and 22 were found relevant and used in the study.

4.0 Findings

4.1 Samples of Identified Performatives

These are extracts of data presentation organized to give the identified performatives used in Kenyan courtroom discourse. The interactional process in which the judge/magistrate, accused and witness are engaged in the use of performative for sentencing, accusing, defending and challenging among others is fitted to the environment of

the court. These allocate specialized speech exchange system to each participant. They are presented with the respective positions of the judge/magistrate and witness within the turn-taking system.

4.1.1 Request Performatives

In Text 6, the accused has been charged with an assault case after cutting an ear of one of the workers employed by his daughter-in-law. The accused was a father-in-law to the witness. The witness had hired some workers to cut trees for sale. According to the father-in-law, these trees were his. His son and daughter-in-law did not have a right to cut them down. As he argues from this point, he deviates from the assault conversation.

TEXT 6

46. ACCUSED: (Pointing at the accused) *Did you come with the trees from your home or you got them in my home when you got married to my son?*

47. WITNESS: (Hesitates) *I got them in your home....*

48. ACCUSED: *So, what is your problem?*

49. MAGISTRATE: (To the accused) *We are not talking about trees here, we are talking about you cutting one of the workers. Answer yes or no.*

50. ACCUSED: *No, I did not cut anybody.*

Turns 46 and 48 are request performatives used by the accused. The accused is deviating from the subject of conversation. He is violating the Gricean maxim of relevance in attempting to avoid incriminating himself. The witness hesitates because of the direction of questioning taken by the accused.

4.1.2 Expressive Performatives

In Text 7, the accused owns a workshop. He sold the complainant's sofa-set without his consent. The complainant is represented by the advocate. During the interaction, the accused is put firmly in his interaction place by the advocate and the magistrate.

TEXT 7

66. ADVOCATE: *You claim the complainant had a grudge with you?*

67. ACCUSED: *Yes, your honour, i was making for him some sofa-set worth fourty-eight thousand shillings. He only paid twenty thousand shillings....I later sold it because I lacked space to store it anymore....i returned his money.*

68. ADVOCATE: *How comes you don't have a witness? Don't you have a neighbour or a helper at the workshop?*

69. ACCUSED: (5:12) *I only had one helper who died...I couldn't bring my neighbours because I was locked up in the cell so I couldn't reach them.*

70. ADVOCATE: *How about the workshop owner (Landlord)? Did he know about the sofa-set?*

71. ACCUSED: (6:18) *He only deals with the workshop rent not the business....*

72. MAGISTRATE: *Hold on, the court is not interested in what he deals with, Answer yes or no.*

The question tag initiates the conversation. This is responded to at length in turn 67 as the witness explain the probable course of grudge between him and the complainant. The advocate directs the witness to a different perspective in turn 68. In Turn 69, the accused uses expressive performatives to explain why he lacks a witness in the words:

I only had one helper who died....

*I couldn't bring my neighbours because I was locked up
in the cell, so I couldn't reach them....*

The persistence of the advocate on the issue of a witness in turn 70 seems to have irritated the accused. By stating the responsibility of the landlord in Turn 71, he is assuming control of the interaction. At this point, the magistrate steps in to put him in his interactional place in Turn 72. The advocate then demands for a yes or no answer.

4.1.3 Disputation Performatives

In Text 14, the accused was put on his defense against murder allegation. He was being cross-examined by an advocate.

TEXT 14

13. **ADVOCATE:** *Where were you at 1; 30 am on 10th Jan 2010?*
14. **ACCUSED:** *I was on my way home from the bar my honour.*
15. **ADVOCATE:** *Where did you say you met the deceased?*
16. **ACCUSED:** *Before I left the bar your honour.*
17. **ADVOCATE:** *Now, tell the court again the time when it was.*

The advocate has evidence from the previous findings and is aiming at finding answers to make comparison. This is what the perlocutionary effect is in this turns. The question in Turn 15, is inviting the accused to repeat and/or clarify what he said previously about meeting the deceased. This question is taking the discourse backwards.

The accused is not being specific in turn 16 and therefore violates the Gricean maxim of quality. In both Turns 14 and 16, the accused is using disputation performatives. He does not want to commit himself to a specific time. In Turn 17, the advocate is being more particular and is asking for a specific time in order to achieve the intended perlocutionary effect. This Turn reflects the effort of the advocate to elicit the intended response from the accused.

4.1.4 Declarative Performatives

This is extracted from a murder case in which the accused was represented by an advocate.

TEXT 10

1. **JUDGE:** (0.30) (Looks at the advocate) *I hope you are aware of the seriousness of the charge placed against your client?*
2. **ADVOCATE:** *Yes, your ladyship but my client should be given a bond. He deserves this like any other Kenyan citizen.*
3. **JUDGE:** *Murder charge is very serious. By asking for a bond, you should have realized some of the consequences. First, your client may commit the same offence once out of this place. Secondly, he can face the wrath of community members who are still bitter and can kill him. Thirdly, he can interfere with the investigations by threatening the witnesses or convincing them to give contrary testimony. Lastly, he can disappear and this will halt process of the case. Do you understand the implication of guaranteeing your client a bond?*
4. **ADVOCATE:** *Yes, your ladyship.*
5. **JUDGE:** *After putting all these facts into consideration, I have decided that your client will not be guaranteed a bond.*

In Turn 1, the judge uses the word 'hope' in the sentence as a verb indicating the possibility that the advocate, being a law-professional is aware of the seriousness of the charge against his client. The use of the question tag transforms the sentence into a question. The judge uses this to confirm the awareness. In Turn 2 the advocate affirms this in the words (*Yes, your ladyship*). These provide the preferred response (perlocution). He proceeds with the word (but) which contrast the affirmation. The judge reminds the advocate of the consequences of his request using declarative performatives. This is done in the following phrases:

i *The client may commit the same offense once out of custody.*

ii. *He can be killed by the angry community*

iii. *He can interfere with the investigations by:*

(a) *Threatening the witness*

(b) *Convincing the witness to give contrary testimony and*

iv. *He can disappear to avoid facing charges.*

At the end of these statements, the judge asks a question to the advocate. This is done deliberately to alert the advocate that being a law professional he should understand the stated consequences. In Turn 4 he agrees with this in the words (*Yes your ladyship*). Turn 5 states the verdict which is based on the rules of the court.

4.1.5 Confession Performatives

Text 18 is an assault case. The accused had stabbed the complainant with a knife. An advocate represented the complainant.

TEXT 18

4. ACCUSED: *I removed the knife after he had hit me on the face your honour this was.....*

5. ADVOCATE: *Did you stab him or not?*

6. ACCUSED: *I was trying to defend myself so....*

7. ADVOCATE *...Answer YES or NO*

8. ACCUSED: (09:00) *Yes.....Your honour.*

In Turn 4 the accused is put on his defense. In trying to convince the court that he is not guilty he flouts the Cooperative Principle Maxim of quantity by giving more information than necessary. He also flouts the maxim of manner as he tries to avoid incriminating himself. In Turn 5 the advocate terminates this utterance by demanding for one word response in the words (*ANSWER YES OR NO*). These words are pronounced in loud tone. The advocate directs the conversation in Turn 5 and 8. In Turn 4 and 6; the accused uses confession performatives in the words:

a) *I removed the knife...Turn 4*

b) *I was trying...Turn 6*

These are accompanied with the following justification utterances:

a) *After I had hit...Turn 4 and*

b) *...to defend...Turn 6*

The perlocutionary effect is not achieved since the accused does not adhere to this instruction. The advocate interrupts in Turn 7 creating an overlap. The pause (09:40) in Turn 8 indicates the desperation of the accused after failing to justify his action. This text illustrates how the judicial representatives aim at getting 'preferred or appropriate' responses to achieve their goals.

4.1.6 Directive Performatives

In the Text below, the accused was charged with kidnapping. The witness is giving testimony in defense of the accused.

TEXT 4

4. **ADVOCATE:** *Have you met the lady before?*
5. **WITNESS:** *Yes your honour,I once visited my friend when he was an employee* in
...
6. **ADVOCATE:** *(?) Answer YES or NO.*
7. **WITNESS:** *Yes, your honour, but...*
8. **ADVOCATE:** *(Addresses the judge) That's all your ladyship.*

In Turn 4, the advocate representing the complainant asks the witness whether he had seen the lady before. In Turn 5 the witness gives an elaborate explanation of how they met. By doing so, he flouts the maxim of quantity. This is interrupted by the advocate in Turn 6. In Turn 7, the witness obliges but tries to give extra information again. Once more, the advocate denies him the opportunity and terminates the interrogation when he turns to the judge in Turn 8. In Turns 4 and 6, the advocate uses directive performatives in the words:

- a) *Have you met the lady before?*
b) *Answer YES or NO.*

These have the obvious intended perlocutionary effect of a yes response in Turn 7. In both responses, the witness uses confession performatives Turns 5 and 7. He witnessed the destruction and collected the relevant evidence presented before the court.

4.1.7 Denial Performatives

TEXT 16

16. **JUDGE:** *Have you any more to say for yourself?*
17. **ACCUSED:** *I came to the house and found her lying on a pool of blood, your ladyship.*
18.: **JUDGE:** *I cannot tell when you came to the house. From the testimony given by the witness I, (points at the witness) the noise was only heard after you had come to the house.*
19. **ACCUSED:** *Your ladyship, I never uttered a word to my wife....*
20. **JUDGE:** *Well, have you finished?*
21. **ACCUSED:** *Your ladyship, I went straight...after...*
22. **JUDGE:** *I am not interested in whether you took a shower or not...you remained in the house with your wife alive, is that not true?*
23. **ACCUSED:** *Yes, your ladyship.*
24. **JUDGE:** *When she came ...she met a crowd of people outside...by that time, you were not in the house and your wife was lying in a pool of blood. Is that true?*
25. **ACCUSED:** *Yes, your ladyship.*
26. **JUDGE:** *Do you have a mind to say anything more?*
27. **ACCUSED:** *No, your ladyship.*
28. **JUDGE:** *Good, step down.*

In Turn 16, the judge is not requesting for information but goes beyond by asking whether the accused has something to say for himself in the serious accusation of murdering his wife. In Turn 18, the judge declares that the time the accused came to the house was not important. This nullifies the response in Turn 17. The obvious perlocutionary effect of the judge's request for information is provision of an answer by the accused. In Turn 20 and 21, the judge rejects the testimony of the accused. The accused person supplies arguments to prove that he could not have murdered his wife by means of various responses. These include the use of the following denial performatives;

- i. *That he came to the house and found her lying in a pool of blood..... Turn 17*
ii. *He did not utter any word to his wife and only sent his house help to the shop.....Turn 19 and*
iii. *That he went to take a shower.....Turn 21*

In Turn 22, the judge further interrupts the accused using the performatives (*I am not interested...*) This creates an overlap. In this Turn, the judge plays a dual role in the trial process. She does not only represent the law but also controls and moderates the talk produced by the accused.

4.1.8 Promissory Performative

In the below illustration below, the accused was found driving a lorry without a driving license and with worn out tires.

TEXT 8

8. PROSECUTOR: *On 22nd May 2010 you were found driving a lorry...do you plead guilty or not guilty before the court today?*

9. ACCUSED: *(0.30) I plead guilty your honour.*

10. MAGISTRATE: *Do you have any request to place before the court?*

11. ACCUSED: *(Nods) yes your honour.*

12. MAGISTRATE: *Proceed.*

13. ACCUSED: *Yes your honour, I kindly ask for forgiveness and promise never to commit such an offence again.*

14. MAGISTRATE: *(3.10) Having listened to your case and carefully considering your request, the court has ordered that you pay a fine of 5000 shillings for the first offence or face three months imprisonment, 2500 shillings for the second ...one and a half a month...*

In this Text, the prosecutor reads the offences with which the accused has been charged in turn 8. The accused pauses (0.30) then proceeds in the words:

I pleaded guilty... Turn 9

In Turn 10, the magistrate uses the words:

Do you have any...

These are used to ask the accused if he has any requests to place before the court. Turn 11 begins with a nod by the accused as a non-verbal expression of a 'yes' response that follows. The magistrate's contribution in Turn 12 in the word 'proceed' is symbolic of the judge/magistrate's influence in court. It shows his ability to direct the talk by encouraging and requiring it. In Turn 13, the accused pleads for pardon and uses promissory performatives in the following phrase:

Your honour, I kindly ask for forgiveness and promise never to commit such an offense again.

In Turn 14, the magistrate further uses words like 'charged' and 'imprisonment'. These rely on the codified convention of the court institution. The magistrate can perform certain acts using such words by virtue of the privilege the law gives them. With these performatives, the magistrate is passing verdict to the accused by virtue of what is to be the case if the fines are not paid.

5.0 Conclusion

From the samples, it is evident that eight performatives are frequently used in Kenyan courtroom discourse. Among these, request, declarative and expressive ones are more frequent during cross-examination. Directive and disputation are also more frequent than denial, confession and promissory ones. The judicial participants make declarations, expressions, disputations and directives as law representatives and defendants. The use of denial and confession performatives is limited because they are mostly used by the lay-participants to respond to provided information and their turns are also restricted. This distribution explains the competitive and power-asymmetric nature of courtroom discourse.

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