Privy Council Appeal No. 4 *of* 1954

Twimahene Adjeibi Kojo II, substituted for Chief Kwame Antwi Adjei, Twimahene - - - - - - - - - *Appellant*

v.

Opanin Kwadwo Bonsie and another - - - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1957

Present at the Hearing:

LORD REID
LORD DENNING
MR. L. M. D. DE SILVA

[*Delivered by* LORD DENNING]

This appeal concerns the title to a piece of land at Bonkwaso in the Kumasi district of Ashanti. It appears to be a tract of forest land a few square miles in area. The present caretaker is one Kwadjo Bonsie but he does not live on the land. He lives about 10 miles away at Nerebehi but he has a cottage at Bonkwaso and visits it from time to time. He takes all the profits from the land and hands them to his superior the Odikro (Chief) of Nerebehi. These profits consist of tribute in the shape of rubber, gold dust, snails, big game and cocoa. The Odikro of Nerebehi in turn pays over a share of this tribute to his overlord the Bantamahene (Head Chief of Bantama) whom he serves. Such is the present position and indeed for some time past Bonsie and his ancestors have been caretakers who have paid tribute to the Odikro of Nerebehi who in turn has paid a proportion to the Bantamahene.

Despite this long enjoyment by the present occupants, the Atwimahene (Head chief of Atwima) now lays claim to the land. He lives many miles away at Kumasi: but he says that this piece of land at Bonkwaso was given to his ancestor as a reward for his services in the war against Abrimoro some 200 years ago. The Atwimahene gave evidence by way of traditional history about the war, identifying himself with his ancestors, and speaking as though he himself was present in person. He told how the Bantamahene appointed him with other chiefs to chase Abrimoro and he got as far as Bonkwaso when he was stricken with smallpox and got no further. He was given this land at Bonkwaso as a reward for his services in this campaign. Three other chiefs, the Hiahene, the Akwaboahene, and the Besiasihene, supported his evidence describing the campaign as if they themselves were there and it only happened yesterday. The Atwimahene said that, after the war, he gave a portion of the land away, but that he kept the rest (the part he claims in this action) and his hunters brought him venison, snails and fish from it. About 80 years ago however he became in need of money and borrowed £6 in gold dust from one Kwabena Tenteng of Nerebehi—who was not his subject but was staying on the land—and that he pledged this piece of land with Kwabena Tenteng to secure repayment, giving to Kwabena Tenteng the right to enjoy the profits of the land until the loan was repaid. When Kwabena Tenteng died, however, nothing was said to

his relatives about the pledge. The successors of Kwabena Tenteng have continued to be caretakers on this land until in due course it came to the hands of the present caretaker Kwadjo Bonsie. In 1948 the Atwimahene sent bearers with £6 in money to be paid to Kwadjo Bonsie in redemption of the pledge: but Bonsie denied there was any such pledge. Thereupon the Atwimahene brought this action against Bonsie claiming a declaration of title to the land and an injunction. The Odikro of Nerebehi applied to become a party because he claimed to have an interest in the land and he was made a defendant.

The defendants say that the land never belonged to the plaintiff but was given to the Odikro of Nerebehi at the end of the Abrimoro war. The Odikro of Nerebehi gave evidence, by way of traditional history, saying that he did not go with the first contingent (Hiahene, Akwaboahene and the other warrior chiefs) to chase Abrimoro but that he was sent later to search for the first contingent. He met them on the Supong stream as they were returning victorious. Afterwards he was given the land up to the Supong stream, which included the land at Bonkwaso now in dispute. The Bantamahene (the head clan chief of both the contestants) supported the traditional history of the Odikro of Nerebehi. He said that at the end of the war " I called Nerebehi Dikro and told him to take and possess the land up to the Supong stream where he reached . . . and to bring me any valuables on the land to be given a share thereof ". Kwadjo Bonsie said that he and his ancestors had been caretakers of the land from time immemorial for the Odikro of Nerebehi.

It is plain therefore that each side claimed the land to have been awarded to his ancestor by virtue of the part played by him in the Abrimoro war: and the main issue in the case was, Who was right about the history of the matter? If the land was originally given to Atwimahene for his part in the war, nothing since would have deprived him of it. He would not lose it by pledging it and doing nothing about the pledge for 80 years. But he had, of course, to account for the fact that he had not received any of the profits for many years, and he did this by saying that he had parted with it by way of pledge only. He sought to refute the case of the defendants by saying that the Odikro of Nerebehi admittedly did not take part in the active campaign but only followed up afterwards, and that would not be a sufficient reason for rewarding him with a grant of land.

The case was tried at first instance in the Asantehene's B Court consisting of three chiefs. They heard evidence on several days from 27th February, 1950, to 28th July, 1950, and eventually on 4th August, 1950, found in favour of the defendants in a unanimous judgment delivered by the President, Nana Mensah Yiadom, Amakomhene. The plaintiff appealed to the Native Appeal Court (the Asantehene's A Court) consisting of three head chiefs who heard the case on several days and examined the parties in person. In the result, on 9th December, 1950, the appeal was allowed by a majority of two to one, the Ankobiahene and the Akyempimhene being in favour of the plaintiff; and the Nkwantahene (the President of the Court) in favour of the defendants. The defendants appealed to the Supreme Court (Land Court) at Kumasi (Mr. Justice Windsor-Aubrey), who, on 15th November, 1951, allowed the appeal and restored the decision of the Asantahene's B Court in favour of the defendants. The plaintiff then appealed to the West African Court of Appeal (Foster Sutton, P., Coussey, J.A., and Korsah, J.), who, on 9th January, 1953, dismissed the appeal. The plaintiff now appeals to Her Majesty in Council.

Their Lordships notice that the judges in the Appeal Courts, who were in favour of upholding the decision of the Asantahene's B Court, did so on two grounds: first, that it was a decision of fact depending on the demeanour of the witnesses and almost inviolable on that account: second, that on a review of the evidence it was the correct decision.

So far as the first ground is concerned, their Lordships do not think it was the correct approach to this case. Their Lordships notice that there was no dispute as to the primary facts, that is, the facts which the witnesses

actually observed with their own eyes or knew of their own knowledge in their own life-time. The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard it must be recognised that, in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is the more probable. That is how both the Native Courts approached the matter and their Lordships think they were right in so doing. If both the Native Courts had come to the same conclusion, the Supreme Court would naturally be slow to disturb it. But when the Native Courts differ, as they did in the present case, the Supreme Court is necessarily called upon to review the evidence and draw its own inferences. It should not start with the presumption that the lowest native court (here the B Court) is correct because it saw and heard the witnesses, but should rather give weight to the views of the Native Appeal Court (here the A Court). In the end, however, it must reach its own conclusion, just as a Court of Appeal in England must do on inferences of fact, see *Benmax* v. *Austin Motor Co. Ld.* [1955] A.C. 370.

So far as the second ground is concerned, their Lordships have themselves reviewed the evidence. Two facts stand out as established:

The first is that the defendants have enjoyed the profits of the land without interruption for 80 years. Three or four generations have passed and no suggestion has been made that it was the subject of a pledge. The evidence shows that, if there had been a pledge, it is customary on the death of the pledgee, for a reminder to be given to his successors, whereas none such was given. Even if the custom were the other way round (as was suggested) still no reminder was given: and surely, if no reminder was given, the plaintiff ought to have taken steps long since to draw the defendants' attention to his claim. The failure of the plaintiff and his predecessors to do this goes far to negative his claim.

The second is that in 1919, in the Chief Commissioner's Court for Ashanti, the Odikro of Nerebehi succeeded in an action for trespass to his land next to the Supong stream. This is not the land in dispute, but it is in fact several miles forward beyond Bonkwaso. This is strong support for the defendants' traditional history, for it shows that he did get land as far forward as the Supong. The plaintiff says that the defendant did not take part in the Abrimoro campaign at all, but if that were so, how did he get this piece of land up by the Supong?

Those two facts are so cogent that, in the opinion of their Lordships, they turn the scale in favour of the defendants. Their Lordships appreciate the force of the arguments of the majority of the Asantehene's A Court but on balance they think the decision of the Asantehene's B Court was correct. In so doing they find themselves, on this second ground, in agreement with the President of the A Court, and the Judges of the Supreme Court and the West African Court of Appeal. Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed.

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In the Privy Council

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Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1957