Akilo Royupe Puruno v. *Nixon Koi*

Supreme Court Appeal No.41, (1986). Coram: Bredmeyer, Woods and Los (JJ) Delivered December 18, 1978

INTRODUCTION

This case is another example of the difficulties the judiciary faces in developing nations where ordinary citizens, may be out of ignorance of the legal consequences of the businesses they transact, negligence or indifference believe they can organise their affairs the way they choose without legal advice.

FACTS

If the facts were clear, the courts would not have been confronted with the problem of determining the intention of the parties. And precisely because the facts were not clear evidence given by the parties was not of any assistance to the courts. The dispute as the courts found was in connection with the 'sale' of a truck. The purchaser paid K7,000. for the truck. However, the vendor claimed the agreed price was K10,000 in which case K3,000 was yet to be paid to him by the purchaser. It is not clear why the purchaser did not take delivery of the car for over eight months, after initial payment or why for that period the vehicle was in the repair shop of Ela Motors. What was clear from the evidence was that the vehicle was not fit for the purpose for which it was bought i.e. for hauling things.

It would seem the vehicle had been damaged after the signing of the contract of sale. It was alleged in evidence that the damage was caused by the driver (agent) of the purchaser who attempted to effect delivery of the vehicle to the purchaser. This evidence was not contradicted by the purchaser nor collaborated by Ela Motors. Yet in addition to the K7,000 which the purchaser paid he paid also a further K1,000 towards the cost of repairs estimated at K2,000 and promised to pay the remainder K1,000 the following day. He maintained in evidence that the K1.000 was his contribution to the cost of repairs and that the vendor was to make up the difference. The vendor strongly maintained that already K3,000 being the remainder of the cost of the truck was still outstanding.

ISSUES

(i) was this a credit sale?
(ii) a hire purchase transaction?
(iii) an out and out sale of goods?

We can assume that the first two issues are far fetched and inconsistent with the known facts, or so it seemed to the courts. The transaction, as far as the courts were concerned, was sale of goods. Instead of the Supreme Court examining the substantive law on the sale of goods more thoroughly Bredmeyer J., in his leading opinion rested his decision on some obscure case: *Browne* v. *Dunn* (1899) G.R. 67 which is not even available in the old English Reports but digested in *Cross on Evidence* 3rd Australian ed. Par.9 61-66. The gravemen of the controversy between the parties, it would seem, was not merely a question of the proponderance of evidence one way or the other since in a civil case the

plaintiff's duty to discharge the onus of proof on him is not as onerous as that on the prosecution in a criminal case But to an already intractible problem of plaintiff discharging the onus of proof on him was the added dimension of defendant's counter-claim for his balance of K3,000 Justice Bredmeyer was content to state the rule in *Browne* v *Dunn* that 'if a party intends to contradict a witness by other evidence he must put that contradiction to the witness in cross-examination to give him a chance of explaining the contradiction Failure to do so can lead to one or more of about seven consequences' He applied the principle to plaintiff's failure 'to cross examine the defendant and put to him that the price was to be fixed by him at between K7,000 and K10,000 after repairs', and the defendant's failure 'to cross examine the plaintiff and his witness that the agreed price was K10,000 to be paid K7,000 down and the balance to be paid in six months'

The real issue which he appropriately raised at the beginning of his opinion i e 'Did the plaintiff get delivery of the truck? What were the terms of the contract about delivery? Under s 18 of the Goods Act Cap 251 the property in goods passes from the buyer to the seller when the parties intend it to be transferred and that depends on the terms of the contract in the oral contract in this case on the conduct of the parties, and the circumstances of the case Under s 20 of the Act the risk passes with the property, i e the goods remain at the seller's risk until property in the goods is transferred to the buyer" received no further examination beyond saying that the magistrate's view on the question of delivery and that of the appeal Justice Amet was "based on probabilities rather than the demeanour and credibility of witnesses' How would witnesses' demeanour and credibility be helpful to a court on matters on which vital evidence was lacking?

Neither Woods, nor Loss, J J cared to explain the law of sale of goods too The evidence that plaintiff paid K1,000 towards the cost of repair of the truck raises a strong presumption that a contract of sale had concluded between the parties Under sec 27 the buyer is under a duty to deliver the goods and the buyer to accept and pay for them Sec 28 reiterate the provisions of Sec 27 by providing that payment and delivery are concurrent obligations Of course there may be other stipulations as to delivery as exemplified by the Zambian case A J Trading v Chilombo (1973) *Z L R* 55, the Nigerian case *Dawadu* v *Anderson Co Ltd* 6 *M L R* 106 and the English cases *Hartley* v *Hymans* [1920] 2 *K B* 475 and *Richards* v *Oppenhaim* [1950] 1 K B 616 Sec 29 provides for means of delivery, the most obvious being that where goods are bought on the premises of the seller, delivery takes place there in the absence of a stipulation to the contrary Sec 29(2) Sec 1 also provides that "delivery" means transfer of possession, actual or constructive from one person to another Since delivery may be actual or constructive, delivery to the buyer's agent eg a carrier is as good as delivery to him *Toba Pty Ltd* v *Poole* [1984] P N G L R 94, *City Council of Ndola* v *Colcom Co-operative Ltd* (1968) *Z L R* 182, *Bear* v *Walker* (1877) 4 L J Q B 677 The question is on whose behalf was the driver who allegedly drove the vehicle and damaged it acting? If he was sent by the purchaser, which seemed probable, because it is inconceivable that having paid for the truck, the seller in the absence of an agreement to that effect, would volunteer to drive it to the buyer's house, then his possession of the truck was as good as the purchaser's He became agent of the principal - there was no onus on the defendant to show that he undertook to drive the truck to the plaintiff's house

Inspite of proof of the conclusion of a sale agreement it is often not easy to determine at which point in time property in the goods passes to the buyer Sec 18(1) makes this dependent on the time the parties *intend* this to happen Secs 19 and 20 elaborate on the matter Admittedly this is another difficult area of the law of sale of odds because the courts must probe into the question of the intention of the parties And a corollary of the rule of passage of property is that the risk in the goods passes with the goods, See F H

Lawson, 'The Passing of Property and Risk in Sale of Goods: A Comparative Study' *L.Q.R.* vol.65 (1949) p.352.

Counsel in a case are as much officers of the court as the judges and owe a duty to the court to help the tribunal to arrive at a just decision. It does not seem that counsel attended to this case with such thoroughness as is required of them. For certainly one of them could have sub-poened Ela Motors to clarify certain issues. The result is that though this is a case involving the sale of goods, the decision is not helpful to either practitioners or students of law as an important case in the area of sale of goods.

H.A. AMANKWAH
Faculty of Law
University of Papua New Guinea