**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT ELDORET**

**Civil Case 122 of 2003**

**MOI UNIVERSITY:.....APPELLANT**

**VERSUS**

**1. ERICK KOSURI NYANDERE**

**2. JOSEPHINE MAINGI:.....RESPONDENTS**

**JUDGEMENT**

On 24th April 2005 ERICK KOSURI NYANDERE the 1st respondent in this appeal land who was the plaintiff in Eldoret. SPM.CC.NO.265 OF 1996 was a passenger in motor vehicle Reg. No. KXL 874 an ISUZU canter which was owned by MOI UNIVERSITY the appellant herein and who were the defendants in the case before the lower court. They were traveling from Eldoret Town towards the University main campus. They were on Eldoret – Nakuru road. On the way the vehicle hit a cow which was on the road killing it instantly. Police were called to the scene and started investigations. The dead cow was removed from the road. The police then ordered the driver of the vehicle one **WILSON KIPTABUT** (DW1) to drive the vehicle back to Eldoret police station. DW1 drove ahead for about 200 meters and he was trying to turn a motor vehicle **Reg. No. KAD 292 P** owned by **JOSEPHINE MAINGI** who is the 2nd respondent in this appeal and was a 3rd party in the suit, and being driven by **JOSEPH MWEMA KIMEU** (DW2) came from Eldoret direction. As it was trying to overtake the canter the canter turned to the right. **AM/V. KAD 292P** hit the canter vehicle was thrown off the road. The 1st Respondent was still in the vehicle and was injured. He was taken to hospital where he was treated. He later filed this suit against the 1st Respondent.

Appellant applied for leave to serve 3rd party Notice to the 2nd Respondent. This was allowed and the 2nd Respondent filed her defence. The suit was then heard. The learned magistrate found that the driver of the appellants vehicle was to blame for the accident. He however found that the driver of the 2nd respondent contributed to the accident by trying to overtake without ensuring that all was okay. The Magistrate apportioned liability as 90% against the appellant and 10% for the 2nd respondent. On quantum the court awarded the 1st respondent Shs.150,000/= general damages and Shs.2,100/= special damages plus costs. Being dissatisfied the appellant preferred this appeal.

There were five grounds of appeal preferred. Mr. Kuloba who prosecuted the appeal combined grounds 1,2,3 and 5 which are a liability and argued them together then ground 4 on quantum alone. He told the court that the trial court erred in finding that the appellants driver was to blame for the accident. He said the accident was caused by the driver of the 2nd respondents vehicle. He told the court that the trial court erred in finding that the appellants driver was to blame for the accident. He said the accident was caused

by the driver of the 2nd respondents vehicle. Driver of appellant had turned the vehicle into a feeder road when it was hit by the other vehicle. the driver of that vehicle was negligent as the appellants driver had put on indicators and leaves had been placed on the road to warn drivers. Appellants driver was not making a U – turn on the road as alleged.

Further he said the apportionment of liability at 90% to 10% for the appellant and 2nd respondent was into proper as the 2nd respondents driver was the one on the wrong.

On quantum he told the court that the award of Shs.150,000/= as general damages was excessive and the proper amount should have been Shs.50,000/=. The injuries suffered were soft tissue injuries and were not serious.

Mr. Wanyonyi for the 1st respondent submitted that there was no dispute that the accident took place. He said there was evidence that the driver of the appellants vehicle made a U-turn on the road. He was therefore negligent and that is why police charged him. He said the finding on liability was proper.

As for quantum he told court not to interfere with the award. The award was not excessive. Two medical reports were produced and they showed the 1st respondent suffered multiple injuries.

Mr. Onyinkwa for the 2nd respondent submitted that the decision of the trial court was wrong only to the extent that it did not find appellant 100% liable. He otherwise supported the findings of the trial court.

I have considered the appeal and the evidence adduced. The first issue is that of liability. There is no dispute that the accident took place and the 1st respondent was injured. The issue of liability was between the appellant and the 2nd respondent whose vehicles collided. It is clear from the evidence that the collision took place when the vehicle belonging to the appellant turned to the right as it tried to turn back to Eldoret. The 1st respondent in his evidence said that it made a U – turn on the road. **PETER MAINGI** a witness called by the 2nd respondent and who said he was in the vehicle also said the appellants vehicle made a U – turn **JOSEPH MAINGI** who was the driver of M/V KAD said the other vehicle turned suddenly to the right as he was overtaking. Also **IP HENRY KIBUTHU** said that appellants vehicle driver mad ea U – turn. DW1 the driver of that vehicle said he was turning into a feeder road and not making a U-turn as alleged. I do agree with the trial magistrates findings that the two drivers were on the wrong and that the appellants driver contributed more to the accident. It is clear he turned to the right as the driver of **M/V KAD 292P** was overtaking and that is when the collision occurred. The collision was on the road and not off the road. It was on the right side as one faces Nakuru. **M/V KAD** could not have moved from the left side to the right if it was not overtaking. It was doubtful if **DW1** had put on any indicators at all. I believe that is why he was charged for the accident. The fact that he was acquitted alone does not absolve him from the blame.

The Magistrate stated that driver of **M/V KAD 292P** was also to blame for he should have been more careful when overtaking. that was so. He saw there were police officers at the scene and a dead cow off the road. He should have been more careful.

The apportionment of liability was proper. The driver of the appellant driver contributed hugely to the accident and it was right he bear 90% blame.

As for quantum two medical reports were produced. They showed the 1st respondent suffered multiple injuries. It has been held severally that appellant courts should not interfere with award of damages by a trial court unless the court is satisfied that in assessing damages trial court took into account inherent factors or left out relevant factors or the amount awarded is inordinately high or inordinately law. See **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE & A.N.VS AM. LUBIA & ANOTHER (1982-88) 1 KLR 727**. In this case the award of Shs.150,000/= for multiple injuries cannot be said to be inordinately high. It is not excessive. The 1st respondent called medical evidence. the appellant did not

controvert that evidence.

The upshot of the above therefore is that I find the whole appeal has n merit. The same is dismissed with costs.

Dated and Delivered at Eldoret on 13th of June,2007.

**KABURU BAUNI**

**JUDGE**

**DELIVERED IN THE PRESENCE OF:**

C/C - David

Mr. Mibeya for 2nd Respondent

N/A for Appellant

N/A for 1st Respondent.