**Director of Pensions v Cockar**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 16 December 1999

**Case Number:** 50/99

**Before:** Gicheru, Shah AND Owuor JJA

**Sourced by:** LawAfrica

**Summarised by:** H K Mutai

*[1] Constitutional law – Holders of constitutional office – Remuneration – Payment of pensions –*

*Calculation of pension payable – Applicable law – Failure to amend statute to reflect new salary structure – Calculation of pension based on old structure – Whether Appellant erred in relying on old salary structure – Constitution sections 99, 104 and 112 – Pensions Act (Chapter 189), sections 3 and 10 – Constitutional Offices (Remuneration) Act Chapter 423, section 2(1) – Regulations for the Granting of Pensions, Gratuities and other Allowances to Officers in the First Schedule to the Pensions Act, regulation 20(1)(*a*). [2] Judicial review – Orders of* certiorari *and* mandamus *– Whether the orders of* certiorari *and* mandamus *available. [3] Words & Phrases – “May” – Whether use of word confers discretion to compute or not to compute pension – Pensions Act Chapter 189 section 3(1)*

**Editor’s Summary** On 1 January 1993, the Kenyan judiciary was detached from the rest of the civil service and a new, higher salary structure was put in place for those in the judicial service. As part of the new structure, new job groups, J1, J2 and J3 were introduced for the judiciary. The Respondent joined the Kenyan judiciary as a resident magistrate on 2 October 1961 and rose through the ranks to become the Chief Justice on 28 December 1994. He served in that capacity until, on attaining retirement age, he retired on 3 December 1997. According to the Respondent’s letter of appointment, his salary was to be within salary scale J3 and he was to enter the salary scale at the maximum entry point. However, unbeknown to the Respondent, the Constitutional Offices (Remuneration) Act, Chapter 423, Laws of Kenya of 1987, which governed the remuneration of the holders of constitutional offices, had not been amended to incorporate the higher salary structure enjoyed by officers in the judiciary and continued to reflect the Chief Justice as being in job group T. In spite of this anomaly, the Respondent and all other holders of constitutional offices within the judiciary were paid in accordance with the new salary structure. On 2 December 1997, a claim form for the Respondent’s retirement pension was filled in and forwarded to the treasury setting out the rates of salary and pension allowances that he had been receiving for his last three years of service and on which his pension was to be calculated based on the Pensions Act, Chapter 423 and regulation 20(1) of the Pensions Regulations. According to these figures the Respondent was due to receive a monthly pension of KShs 56 067-59 and a lump sum gratuity of KShs 4 485 407-80. However, in a letter dated 3 December 1997, the Appellant, whose duty it was to calculate and pay pensions, informed the Respondent, that his monthly pension had been assessed at KShs 22 990-60 and his lump sum gratuity at KShs 1 839 247-90. The Appellant’s calculation was based on the Constitutional Offices (Remuneration) Act, which she claimed governed, *inter alia*, the calculation of pensions, and according to which the Respondent was still earning on the lower salary scale, group T. On 5 October 1998 the Respondent filed a notice of motion against the Appellant seeking orders of *certiorari* and *mandamus* to quash the Appellant’s decision and compel her to assess his pension and gratuity on the basis of the full annual pensionable emoluments he enjoyed at the date of his retirement. The court ruled in his favour and found that his actual salary at the time of his retirement should have been the basis of computing his pension. The Appellant appealed on the grounds, *inter alia*, that the court erred in granting the orders of *certiorari* and *mandamus* since the power to grant pensions was discretionary and the court could not substitute its own discretion for that of the Appellant. Further, the Appellant’s counsel argued that in calculating the Respondent’s pension the Appellant was enjoined in law to rely on his salary as set out in the Constitutional Offices (Remuneration) Act and any attempt by her to compute the pension outside that Act would have been illegal. Counsel for the Respondent argued that the salary paid to judicial officers had been approved by Parliament annually, that the government could not run away from its obligations and that the Pensions Act was the statute applicable to the situation. Moreover, he submitted that, as the Appellant’s actions were of an administrative nature, the orders of *certiorari* and *mandamus* had to issue.

**Held** – The power given to the Minister by section 3 of the Pensions Act, and delegated by him to the Director of Pensions by legal notice number 317 of 1974, though connoting a discretionary power to grant pensions, did not empower the Appellant to deprive a person who was eligible for a pension of that pension. Even if there was such a discretion, its use had to be judicious and the computation of a pension on the basis of a job group that did not exist for the person in question would be an injudicious and arbitrary exercise of that discretion. The creation of a new salaries structure for judicial officers must have been done after due consideration by the government and the government could not now say that it had made no provision for payment of the pensions on the new structure. The plea that the Respondent’s salary was not in conformity with the Constitutional Offices (Remuneration) Act was to no avail in the face of the provisions of regulation 20 of the Pensions Regulations which clearly provided that a pension was to be calculated by reference to the period of three years immediately preceding the person in question’s date of retirement. In arriving at her decision, the Appellant came to a decision that was contrary to the Constitution, the Pensions Act, Chapter 189 and the Constitutional Offices (Remuneration) Act and as such *certiorari* would lie to quash the decision. Though the issue of *mandamus* should have been limited to a direction requiring the Appellant to perform her legal duty by computing the Respondent’s pension and gratuity in accordance with the law, as the sum due under the new structure was not in dispute, it would have been futile to ask her to recalculate the pension.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Kenya National Examination Council v Njoroge and others* civil appeal number 266 of 1986

(unreported)

*Raichand Khimji and Co v Attorney-General* [1972] EA 536

***United Kingdom***

*R v Minister of Health Exparte Committee of Vistors of Glamorgan Country Mental Hospital [1939] 1*

*KB 232 CA;* [1938] 4 All ER 32

*Rederiaktiebologet Ampitrite v R* [1921] 3 KB 500

*Reilly v R* (1934) AC 176

*Robertson v Minister of Pensions* [1948] 2 All ER 767