**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)*

**JUDGMENT**

**GICHERU JA:** Section 99(1) of the Constitution of Kenya is in the following terms:

“99(1) S ubject to subsection (2), all revenues or other moneys raised or received for the purposes of the Government of Kenya shall be paid into and form a Consolidated fund from which no moneys shall be withdrawn except as may be authorized by this Constitution or by an Act of Parliament (including an Appropriation Act) or by a vote on account passed by the National Assembly under section 101”. Subsection (2) of this relates to the provision by or under an Act of Parliament for any revenues of the government of Kenya to be paid into some public fund (other than the consolidated fund) established for a specific purpose, or to be retained by the authority that received them for the purpose of defraying the expenses of that authority, but with the restriction that moneys from any such public fund shall not be withdrawn unless the issue of those moneys has been authorized by or under a law; and section 101 of the Constitution of Kenya relates to authorization of expenditure in advance of the Appropriation Act for a financial year. Section 104(1), (2), (3) and (5) of the Constitution of Kenya provides that: “104(1) There shall be paid to the holders of the offices to which this section applies such salary and such allowances as may be prescribed by or under an Act of Parliament. (2) The salaries and any allowances payable to the holders of the offices to which this section applies shall be charged upon the consolidated fund. (3) The salary payable to the holder of an office to which this section applies and his other terms of service (other than allowances that are not taken into account in computing, under any law in that behalf, any pension payable in respect of his service in that office) shall not be altered to his disadvantage after his appointment. (4) This section applies to the offices of Judge of the High Court, Judge of the Court of Appeal, member of the Public Service Commission, Attorney-General and Controller and Auditor-General”. Under sections 60(2) and 64(2) of the Constitution of Kenya the Chief Justice is both a Judge of the High Court and the Court of Appeal. Section 104, *supra*, is therefore applicable to him. Section 3(1) of the Pensions Act, Chapter 189 of the Laws of Kenya, hereinafter called the Pensions Act, provides that: “3(1) Pension, gratuities and other allowances may be granted by the Minister, in accordance with the Pensions Regulations, to officers who have been in the service of the government”. The power of the Minister under the aforesaid section is delegated to the principal pension’s officer of the pensions division of the treasury now called the Director of Pensions, the Appellant herein. For the purposes of this appeal, regulation 20(1)(*a*) of the Regulations for the granting of pensions, gratuities and other allowances to officers in the First Schedule to the Pensions Act, hereinafter referred to as the Regulations, is in the following terms: “20(1) For the purpose of computing the amount of the pension or gratuity of an officer who has had a period of not less than three years’ pensionable service before his retirement – ( a) i n the case of an officer who has held the same office for a period of three years immediately preceding the date of his retirement, the full annual pensionable emoluments enjoyed by him at that date in respect of that office shall be taken”. The Respondent herein joined the service of the Government of Kenya in a civil capacity on 2 October 1961 as a resident magistrate and rose through the ranks to a senior resident magistrate on 15 September 1967, a *puisne* judge on 16 November 1977, a Judge of Appeal on 19 February 1990 and to a Chief Justice with effect from 29 December 1994. He retired on 3 December 1997 after attaining the mandatory retirement age of 74 years. The Kenya judiciary was delinked from the Kenya civil service with effect from 1 January 1993 and those in the service of the delinked Kenya judiciary enjoyed a higher salary structure than that applicable to the Kenya civil service. On his retirement with effect from 3 December 1997, the Respondent had been enjoying the higher salary structure of the delinked Kenya judiciary according to him, therefore, the computation of his pension and lump sum gratuity ought to have been in accordance with the higher salary structure enjoyed by those in the service of the delinked Kenya judiciary. Thus, in computing his pension and lump sum gratuity, the full annual pensionable emoluments enjoyed by him as at the date immediately preceding the effective date of his retirement should have been taken. This would be in consonance with section 10 of the Pensions Act which provides that: “10. A pension granted to an officer under this Act shall not exceed the full pensionable emoluments drawn by him at the date of his retirement” and regulation 20(1)(*a*) of the Regulations as is set out above. Such computation, according to the Respondent, would have led to a correct assessment of his pension and lump sum gratuity which should have been at the rate of KShs 56 067-59 per month and KShs 4 485 407-80 respectively. By her assessment dated 3 December 1997 and addressed to the Respondent, the Appellant assessed the Respondent’s monthly pension at the rate of KShs 22 990–60 and a lump sum gratuity of KShs 1 839 247-90. According to the Appellant, the determinant in this assessment, though at a higher level, was the Constitutional Offices (Remuneration) Act, Chapter 423 of the Laws of Kenya, hereinafter called the Act which had not been amended to incorporate the higher salary structure enjoyed by holders of constitutional offices in the delinked Kenya judiciary. To the Appellant, therefore, no further sums of money are due and payable to the Respondent under the Pensions Act. Indeed, this was the burden of the Appellant’s case in the superior court. According to her counsel in that court, Mr *Muigai*, who also appears for her in this Court, the Appellant’s only problem was the appropriate salary to be taken into account when computing the pension payable to the Respondent. To counsel, the Appellant was enjoined in law in this regard to rely on the Respondent’s salary as set out in the Act. Unfortunately, the salary drawn by the Respondent as at the date of his retirement was not in conformity with the Act. This, according to counsel, could only be attributed to the failure by the Attorney-General to bring to Parliament for enactment an amendment to the Act to incorporate the higher salary structure enjoyed by holders of constitutional offices in the delinked Kenya judiciary and thus avoid the present untidy legal situation in this regard. To counsel, the Appellant obeyed the law and any administrative directive in relation to the computation of the Respondent’s pension and lump sum gratuity outside the Act was illegal. In his ruling dated and delivered on 25 January 1999, O’kubasu J observed that pension is based on actual salary and the salary the Respondent was drawing before his retirement was known. That salary, according to the Learned Judge, was what should have been the basis of computing the Respondent’s pension. The Learned Judge then proceeded to grant the Respondent the reliefs of *certiorari* and *mandamus* which he had sought in the superior court by a notice of motion dated 5 October 1998. These reliefs were to quash the Appellant’s decision determining the pension payable to the Respondent at KShs 22 990-60 per month and a lump sum gratuity of KShs 1 839 247-90 and to compel her to assess the Respondent’s said pension and lump sum gratuity on the basis of the full annual pensionable emoluments enjoyed by him as at the date of his retirement. Dissatisfied by the grant of these reliefs by the superior court to the Respondent, the Appellant has appealed to this Court, the basis of her complaint being encapsulated in four grounds of appeal. At the hearing of this appeal on 18 November 1999, Mr *Muigai* for the Appellant argued grounds one and two of the Appellant’s appeal together and grounds three and four of the said appeal together. The first and second grounds of the Appellant’s appeal concern the grant of the orders of *certiorari* and *mandamus* by the superior court as sought in that court by the Respondent. According to Mr *Muigai*, the power to grant pension is discretionary and the exercise of that power by the Appellant as it affects the Respondent was regular and in accordance with the Pensions Act. The superior court could not therefore constitute itself as an appeal court from the administrative decision of the Appellant. Nor could it substitute its own discretion with that of the Appellant. Hence, the grant of the order of *certiorari* was erroneous. Similarly, the issuing of the order for *mandamus* was wrong as there was no determination of the Respondent’s pension by the president. Thus, the superior court could not compel a specific act to be done which itself could not order. This latter submission related to the Respondent’s prayer for an order of *mandamus* requiring the Appellant to pay to the Respondent a gratuity in the sum of KShs 4 485 409-80 with interest at the prevailing commercial rate of 24% per annum which later sum was purported to be as a result of a determination of the Respondent’s pension by the office of the president. The Appellant’s third and fourth grounds of appeal relate to the computation of the Respondent’s pension on the basis of the salary he was drawing at the date of his retirement as opposed to that set out in the Act and the failure to effect the requisite amendments to the Pensions Act to reflect the pension awardable to the members of the delinked Kenya judiciary. According to Mr *Muigai*, it is impossible to compute pension for the holders of constitutional offices in the delinked Kenya judiciary unless the Act is appropriately amended. In the absence of such amendment and the pensions Act not reflecting the pension awardable to members of the delinked Kenya judiciary, the Appellant cannot be faulted for acting within the provisions of the Pensions Act. Mr *Oraro*’s response to Mr *Muigai*’s submission was that the salary paid to the judicial officers have been approved by Parliament from year to year and the government of Kenya cannot run away from its own obligations which are already in place. According to him, the administration of the Pensions Act is a matter of law and the Appellant cannot escape the obligations imposed by that Act. In determining the Respondent’s pension under the Kenya civil service salary structure, the Appellant acted outside her jurisdiction and as her role remained administrative, the orders of *certiorari* and *mandamus* had to issue.

Section 2(1) of the Act is in the following terms:

“2(1) The salaries to be paid to the holders of the offices specified in the first column of the schedule, being the offices mentioned in section 104 of the Constitution, shall, with effect from the 1 July 1985, be at the annual salary scales or rates specified in relation to those offices in the second column of that schedule. Provided that where a salary scale is specified the holder of the office shall be paid such salary within that scale as the President may determine”.

According to the schedule referred to in this subsection which former appears to have been last amended by Act 6 of 1986, the salary scale of the Chief Justice who is in job group T commences at K£ 10 302 per annum increasing by an annual increment of K£ 324 to K£ 10 626 per annum, and thereafter increasing by annual increments of K£ 360 to K£ 12 066 per annum. Yet on the appointment of the Respondent as Chief Justice with effect from 29 December 1994 his salary scale in job group J3 was K£ 20 358 – 42 882 and he entered that salary scale at the maximum salary point of K£ 42 882 per annum. This salary like that of other holders of constitutional offices in the delinked Kenya judiciary was not reflected in the Act. Yet, year after year the Respondent like all other holders of constitutional offices in the delinked Kenya judiciary was progressively paid a salary in job group J3, which never featured nor does it now feature, in the Act. This payment was legitimate, for being a charge on the consolidated fund, it was sanctioned year after year by the Appropriation Act as indicated at the beginning of this judgment. Indeed, in each financial year, vote R 26 in the Appropriation Act relates to the amount of money required for the salaries and expenses of running the judicial services, including the High Court of Kenya, the Court of Appeal, Magistrates’ and Kadhi’s courts including counsel briefed by court. Under section 104(1) of the Constitution of Kenya, holders of constitutional offices to which that section applies are paid such salary and such allowances as may be prescribed by or under an Act of Parliament. No doubt the appropriate Act of Parliament in this regard is the Act but in its moribund state since 1986, the Appropriation Act which authorizes the payment of their appropriate salaries has the effect of rectifying the deficiency in the said Act from year to year so that the payment of such salaries is legitimate. For this reason, the higher salary scale under which the holders of constitutional offices in the delinked Kenya judiciary are paid their salaries is legitimate and on that account, the Respondent’s full pensionable emoluments as at the date of his retirement on 3 December 1997 should have been the basis of the computation of his pension and lump sum gratuity. Failure by the Appellant to so compute the Respondent’s pension and lump sum gratuity was without jurisdiction and because of this, the Learned superior court Judge was right in granting the order of *certiorari* as sought by the Respondent in the superior court. To require the Appellant to perform her legal duty of computing the Respondent’s pension and lump sum gratuity in accordance with the law, the issuing of *mandamus* to this extent only was necessary. In the result, I would dismiss the Appellant’s appeal with costs to the Respondent. As Shah and Owuor JJA agree, it is so ordered.

**SHAH JA:** The Respondent, Abdul Majid Cockar, was the Chief Justice of the Republic of Kenya from 28 December 1994 until 3 December 1997 when he retired upon attaining the mandatory retirement age of 74 years. He joined the judiciary of Kenya in 1961 and had always since been an officer in judicial service so that at the time he retired he was a public servant within the meaning of the Pensions Act Chapter 189 Laws of Kenya (the Act). The judiciary was delinked from the civil service in 1993 and since then those in judicial service have enjoyed a new salary structure. The said delinking was a step in the right direction. I need not go into the reasons for such delinking. The same are obvious. The Respondent’s appointment as the chief justice was pursuant to the provision in section 61(1) of the Constitution of Kenya (the Constitution). His letter of appointment read (*inter alia*) as follows: “In accordance with the provisions of the Constitutional Officers (Remuneration) Act, your salary will be within the salary scale J3 for the Chief Justice; that is K£ 20 358 – 42 882 pa with effect from 28 December 1994. You will enter this salary scale at the maximum entry point that is K £ 42 882 pa”. Job groups J1, J2 and J3 were introduced after the aforesaid delinking of the judiciary from the civil service. These job groups have, however, not yet found their way into the Constitutional Offices (Remuneration) Act. The schedule to this Act goes up to job group T only. This is the anomaly which has bedeviled the issues raised in this appeal as well as in the superior court. Mr D I Kanja, on behalf of the accounting officer of the judiciary, under reference number 264, filled in the form for claim for retirement pension due to the Respondent and forwarded the same to the treasury for action by the chief accountant pensins, on 2 December 1997. In this form Mr Kanja set out rates of salary and pensionable allowance appertinant to the last three years of the Respondent’s service. His salary was shown as follows:

“1. From 4 December 1994 to 28 December 1994 @ K£25 236 pa

2. from 29 December 1994 to 30 June 1995 @ K£42 882 pa

3. from 1 July 1995 to 30 June 1995 @ K£50 595 pa

4. from 1 July 1997 to 31 October 1997 @ K£55 665 pa

5. From 1 November 1997 to 3 December 1997 @ K£61 236 pa”.

The pension and gratuity computation carried out by the Respondent works out at a lump sum of KShs 4 485 407-80 and it is not in dispute that, if the Respondent’s pension was to be calculated on the new salary scales, this figure is correct. The dispute is as regards the new salary. The Appellant who is the Director of Pensions stated that she could not go by the new salary structure of the judicial officers and that she was bound by the schedule to the Act as a result whereof she could only calculate the pension on the basis of the salary of a person employed in job group T. The fact that the terms and conditions of service for judicial officers and state law office were separated from those of the civil service with effect from 1 January 1993 is not in dispute. That fact is set out in the letter of 9 September 1994 addressed to the registrar of the High Court by the Director of Personnel Management who was also the Permanent Secretary to the Office of the President. In material part the letter reads: “Please note that the judiciary and state law office separated from the terms and conditions of service for civil servants with effect from 1 January 1993 and since then they have not been re-integrated in the civil service. Consequent to the above, the terms and conditions of the two: judiciary/state law office and the civil service cannot be compared after the separation”. The Secretary to the Cabinet and the Head of Public Service as well as the Permanent Secretary to the Ministry of Finance were aware of the contents of the said letter of 9 September 1994. It is also an uncontroverted fact that the treasury budgeted for new salary scales applicable to the judiciary (as a whole) as summarized in the memorandum sent to the Permanent Secretary to the Cabinet and Head of the Public Service who is also the Permanent Pecretary to the Office of the President. Such budgeting was for inclusion in the next budget as to be effective from 1 July 1995. This was contained in the letter dated 25 May 1995 addressed to the Chief Justice by the then secretary to the cabinet. The Ministry of Finance and Director of Personnel Management were of course aware of this fact. Despite the extra budgeting provided for by the Permanent Secretary, Ministry of Finance, when it came to payment of the pension due to the Respondent, the Permanent Secretary to the Ministry of Finance made an about turn and pointed out in his letter dated 10 August 1998 addressed to Head of the Civil Service as follows, where material: “Justice Majid Cockar’s claim documents were received in pensions department on 21 November 1997. The benefits were soon processed and a total sum of KShs 1 839 247-90 together with a monthly pension of KShs 22 990-60 was paid to him on 4 December 1997. The pension benefits of Justice Cockar as calculated by the pensions department were consistent with the cabinet decision of 18 May 1998 (a copy of the cabinet minute number 40/98 is attached herewith for ease of reference). The minute provides among other things that retirement benefits of the officers of judicial service retiring prior to the declaration of service under the delinked judiciary as “public service” continue to be computed on the basis of salaries of comparable grades in the civil service”. That is a curious statement. I fail to see how the pensions benefits as calculated in December 1997 could be consistent with a cabinet decision of 18 May 1998 for the simple reason that at the material time that cabinet decision did not exist. I imagine that the *volte face* came about as a result the stand taken by the Director of Pensions. I see no other reason. It therefore becomes incumbent upon me to examine carefully the stand taken by the Appellant. It would be appropriate at this stage to point out that the Director of Pensions in the Ministry of Finance is by virtue of such position the principal pensions officer of the pensions division of the Treasury. Section 3(1) of the Act provides as follows: “Pensions, gratuities and other allowances may be granted by the Minister, in accordance with the Pensions Regulations, to the officers who have been in the service of the government”. The power given by section 3(1) of the Act to the Minister was delegated to the Director of Pensions by legal notice number 317 of 1974. The Appellant accepts the fact that the Respondent is a pensionable officer within the meaning of the Act. The Appellant lays stress on the word “may” used in section 3(1) aforesaid as well as in regulation 4 in the Regulations to the Act which provides: “Subject to the act and these Regulations, every officer holding a pensionable office in the service of the government, who has been in that service in a civil capacity for ten years or more, may be granted on retirement a pension at the annual rate one five-hundredth of his pensionable emoluments for each complete month of his pensionable service but no pension commencing after 1 July 1997 shall be less than sixty pounds per annum”. Mr Githu *Muigai* who appeared for the Appellants stressed that the use of the word “may” in section 3(1) of the Act means that pension payment is at the discretion of the Minister and therefore Director of Pensions. I am afraid I cannot subscribe to that wide statement. True the use of the word “may” does connote discretionary power in the Director of Pensions. But what happens when the proposed recipient of the pension becomes by law entitled to that pension? If the Minister or the Director can withhold such pension because of the use of the word “may” the power to withhold the same becomes arbitrary and goes against the grain of common sense. Section 70 of the Constitution provides: “70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely– … ( *c*) P rotection for the privacy of his name and other property and from deprivation of property without compensation”. Property includes choices in action, money, or pension. No person who is eligible for pension can be deprived of his pension at the whim of the Director. Once pension becomes due, the Director has no choice but to pay the pension. Here is where I disagree with Mr *Muigai* when he urges that payment of pension is discretionary even when due. Mr *Muigai*’s said argument does not hold water when section 3(1) of the Act is read in conjunction with section 104(3) of the constitution. Statute law is of course subservient to the Constitution, section 104(3) whereof reads: “The salary payable to the holder of an office to which this section applies (that is to constitutional office holders) and his other terms of service (other than allowances that are not taken into account in computing, under any law in that behalf, any pension payable in respect of his service in that office) shall not be altered to his disadvantage after his appointment”. The Constitution itself therefore provides that the emoluments of a constitutional officer (other than allowances that are not taken into account in computing pension) cannot be curtailed to his detriment. If the emoluments cannot be so curtailed the pension certainly cannot be curtailed. Mr *Muigai* however conceded that any exercise of discretion by the Director must be judicious. I do not see how it would be judicious to compute pension on the basis of a job group that does not exist in respect of that judicial officer. It would, in my view, be an injudicious exercise of such “discretion” and would indeed be an arbitrary exercise, if a non-applicable job group was used to calculate pension due to a pensionable officer. The Director’s argument, through Mr *Muigai* before us, and in the superior court through her affidavit was made to look attractively simple. The argument was that unless the schedule to the Constitutional Offices (Remuneration) Act, Chapter 423 is amended the Director cannot consider the actual salary of the Chief Justice as opposed to the salary in job group T. I must point out at this stage that the Director was aware of the new job group of the Chief Justice (J3) and was also aware of the new salary scales applicable to judicial officers. Despite that, shielding herself under the umbrella of Chapter 423, she decided to ignore the new job group which action she justified by saying and arguing that unless the schedule to the Act is amended she could only go by the one as it stands. What therefore falls for consideration is: If the Schedule to Chapter 423 is not updated by the Parliament does it affect the pension payable to the pensionable officer? In other words: can the Parliament by its inaction deprive a citizen of this country of his rightful pension? I think not. This is because section 10 of the Act provides as follows: “10. A pension granted to an officer under this Act shall not exceed full pensionable emoluments drawn by him at the date of his retirement”. Section 10 can clearly be interpreted to say that the pensionable emoluments drawn by the officer at the time of his retirement are the ones upon which calculation of pension ought to be made. Section 10 of the Act was brought in to amend the original section 10 of the Act by Act 7 of 1990. At this time the schedule to Chapter 423 as amended by Act 6 of 1986 was in force. If, as is the case, despite the amendment to the Act there was no amendment to the schedule of Chapter 423, the rights accruing to a pensioner cannot be abrogated and more so in the case of a constitutional officer.” Section 3(5) of the Act however provides: “(5) Any pension or gratuity granted under this Act shall be computed in accordance with subsections (1), (2) and (3) of section 112 of the constitution”. It must be noted that this subsection mandates in no uncertain terms that the pension granted under the Act shall be as provided for in section 112(1), (2) and (3) of the Constitution. That being so the Director is duty bound (she has no discretion) to so compute the pension. But apart from the provisions of the Constitution and the statutes that I have considered I must revert to what I stated earlier in regard to the budgeting made by the Parliament for the new salary scales. Such budgeting is done every year. In each financial year, vote R26 in the Appropriation Act caters for the funds for the judiciary. The Appellant cannot now be heard to say that despite such budgeting she can only go by way of job group salaries as per Chapter 423. When a government includes in its annual budgets an enhanced sum for payment of new salaries it cannot say the said act was illegal. The Appellant cannot now be heard to say that as the Parliament did not gazette the new salaries or that as it did not amend the schedule to Chapter 423, pension can be calculated only in terms of the schedule as it still stands. When an officer enters into the service of the judiciary, even if the employment is on permanent and pensionable terms, the employment is in essence a contract between the government and the employee. The employee must upon retirement which qualifies him for receipt of pension, be paid his pension dues. In the case of *Robertson v Minister of Pensions* [1948] 2 All ER 767, Denning J (as he then was) when considering whether or not the Crown is bound by the assurances it gives said at 770: “The next question is whether the assurance is binding on the Crown. The Crown cannot escape by saying that estoppel does not bind the Crown, for that doctrine has long exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity. i.e. the doctrine that Crown cannot bind itself so as to fetter its future executive action. That doctrine was propounded by Rowlatt J, in *Rederiaktiebologet Ampitrite v R* [(1921) 3 KB 500], but it was unnecessary for the decision, because the statement there was not a promise which was intended to be binding but only an expression of intention. Rowlatt J, seems to be influenced by those cases on the right of the Crown to dismiss its servant at pleasure, but those cases can now be read in the light of the judgment of Lord Atkin ([1934] AC 179) in *Reilly v R* [(1934) AC 176]. That judgment shows in regard to contracts of service, the Crown is bound by its express promise as much as any subject. The cases where it has been held entitled to dismiss at pleasure are based on implied term which cannot, of course, exist where there is an express term dealing with the matter. In my opinion the defence of executive necessity is of limited scope. It only avails the Crown where there is an implied term to that effect, or that is the true meaning of the contract. It has certainly no application to this case. The war office letter is clear and explicit and I see no reason for implying a term that the Crown is to be at liberty to revoke the decision at its pleasure and without cause”. The Appellant in this case states in her replying affidavit, paragraph 34 as follows: “34. That by reason of the matters set out in paragraph 32 of this affidavit I verily believe the salary scale referred to in the Chief Justice’s letter of appointment is inconsistent with the express provision of the Constitutional Offices (Remuneration) Act and as such irrelevant to the question of his salary in that capacity for the purposes of calculating his pensionable emoluments in accordance with the Pensions Regulations for the purposes of the Pension Act”. This statement on oath by the Appellant is amazing. She is saying that despite the salary of the Respondent having been increased by the government (and approved by the treasury), such salary cannot be taken into account in computing the pension. The government is bound by the salary scales it approved for judicial officers. It cannot renege on that. The government cannot say now that it has made no provision for payment of pensions on the new salaries structure. There is no doubt at all that the salaries of judicial officers were increased after due consideration by the government and no responsible officer of the government can say that despite such increases pension can only be calculated on job group scales which exist no more for such officers. It is no use saying that the salary drawn by the Respondent was not in conformity with Chapter 423. To say that the enhanced part of the salary is not pensionable is flying in face of regulation 20 of the Pensions Regulations contained in the First Schedule. It reads: “(1) For the purpose of computing of the pension or gratuity of an officer who has had a period of not less than three years, pensionable service before his retirement: ( *a*) I n the case of officer who has held the same office for a period of three years immediately preceeding the date of his retirement, the full annual pensionable emoluments enjoyed by him at that date in respect of the office shall be take. ( *b*) I n the case of an officer who at any time during the period of three years has been transferred from one office to another, but whose pensionable emoluments have not been changed by reason of the transfer or transfers, otherwise than by the grant of any salary increment, the full annual pensionable emoluments enjoyed by him at the date of his retirement in respect of the office then held by him shall be taken”. This regulation then goes on to show how the pensionable emoluments are to be calculated. The Respondent, for the last three years of his service, was first a Judge of Appeal and then the Chief Justice of the Republic of Kenya so that he has had, clearly, to his credit a period of not less than three years’ pensionable service before his retirement. Regulation 20 of the Pension Regulations has the full force of the law by virtue of provision in section 3(4) of the Act which reads: “(4) All regulations made under this section shall have the same force and effect as if they were contained in the first schedule to the Act”. This can only mean that the Respondent was entitled to his pension based on his last salary by reason of the wording of regulation 20(1) which provides that “the full emoluments enjoyed by him at that date in respect of that office shall be taken” (empasis mine). The Respondent’s salary for the last three years of his service has been set out by Mr D I *Kanja* as I have stated elsewhere in this judgment. What I have said so far ought to conclude the fate of this appeal but there are more issues raised by the Appellant that need answering. The Appellant stated in response to the Respondent’s application in the superior court in paragraph 11 of her first affidavit as follows: “11. That since the ‘Establishment Circular number 51 of 6 December 1958’ was issued ‘enhanced salary scales’ which is what the new terms of service for the judiciary amount to, were abolished. There is therefore no legal basis for making any pension payment outside the civil service salary scheme”. The Establishment Circular number 51 of 6 December 1958 only abolished “enhanced contract scales” introduced in 1955. The Appellant has misunderstood and misapplied this circular. It has nothing to do with what a pensionable judicial officer earns to day. Regulation 21(2) to the Pensions Regulations says: “(2) Any officer who was remunerated under any of the enhanced contract scales introduced in 1955 or thereafter and abolished by Establishment Circular number 51 of the 6 December 1958 may at his option (such option to be exercised within three months from the date upon which the officer is admitted to the permanent and pensionable establishment or from the 4 September 1962, whichever date is the later, or on such other day as the president may in any particular case approve) repay to the government a sum equal to the difference between the remuneration he actually received under the enhanced contract scale and the remuneration he would have received under the corresponding scale relating to the permanent and pensionable establishment”. I need not say any more on this score. Regulation 21(2) and regulation 21(3) speak for themselves. The said circular cannot affect what was done in 1993, namely, the delinking of the judiciary from the civil service. The Appellant offered gratuitous advice to the judiciary. She suggested the judiciary enters into a superannuation pension scheme. The judiciary is part and parcel of the government of Kenya. It is the third arm of the government. It is not, like, say, the Kenya Revenue Authority, a statutory body. It is still part of the public service and must of course remain so. Judges’ salaries and emoluments are paid from the consolidated fund. Mr *Muigai* raised an important procedural point. He urged that in this particular case, an order of *certiorari* does not lie to remove into the High Court for the purposes of its being quashed a decision made by the Appellant. He argued that the Learned Judge was in error in proceeding on the assumption that a constitutional office holder can have the pension looked at otherwise than in accordance with Chapter 423. He further argued that in any case prayer for *mandamus* does not lie when an order for *certiorari* lies. A passage in *Halsbury’s Laws of England* (3 ed) Volume 11 was stressed to drive this point home. The passage reads: “119. Erroneous decision. Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior court will not grant the order of *certiorari* on the ground that the inferior tribunal had misconceived a point of Law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction. If however, an administrative body comes to a decision which no reasonable body could have ever come to, it will be deemed to have exceeded its jurisdiction, and the court can interfere”. The last part of the above passage is relevant here. The Director of Pensions, in my view, came to a decision which is totally contrary to the spirit of the constitution, the Act and Chapter 423 as I have already pointed out. *Certiorari* would certainly lie to quash her decision. I am however not too happy with the first portion of the above passage. An inferior tribunal cannot act illegally by accepting, say, illegal evidence. If it does so it must be subject to the discipline of the superior court. However, that is besides the point. The case of *R v Minister of Health Ex parte Committee of Visitors of Glamorgan Country Mental Hospital* [1939] 1 KB 232 CA; [1938] 4 All ER 32 relied upon by Mr *Muigai* decided that the Minister had not acted without jurisdiction, and, although his decision was in effect, construing the provisions of the Act of 1909 (Asylums Officers’ Superannuation Act), it could not be questioned by a grant of *certiorari.* In that case the proceedings were regular upon their face. There was no want of jurisdiction. The Appellant, in this case, however, declined and in fact refused to go by the Constitution, the Act and Chapter 423 to calculate the pension due to the Respondent. In my view she acted unconstitutionally and illegally and in such a case an order of *certiorari* must go forth. It was pointed out by this Court in the case of *Kenya National Examination Council v Republic, ex parte Geoffrey Gathenji Njoroge and others* civil appeal number 266 of 1986 (unreported) as follows: “What do those principles mean? They mean that an order of *mandamus* will compel the performance of a duty which is imposed on a person or a body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed”. The duty imposed on the Appellant was to calculate and pay to the Respondent the pensions he was entitled to upon his retirement. Instead of doing that she went into realms of conjecture and arguments which had absolutely no legal basis. It cannot be said that the Appellant had a right to decide totally wrongly and if she did so she could not be questioned. It would create an impossible situation. The scope of the remedies of judicial review has not diminished. It is being broadened. In recent years the trend is to correct *ex facie* wrong administrative decisions by judicial review or declaratory suits. Declaratory suits are preferable when damages are claimed. See *Raichand Khimji and Co v Attorney-General* [1972] EA 536. Law AVP said at 540: “The High Court has power to quash a decision of a statutory tribunal for want or excess of jurisdiction, breach of Rules of natural justice, error of law on the face of the record, fraud or collusion. In the case of a decision by a statutory tribunal or person exercising judicial or quasi-judicial powers, as was the case here, the High Court is usually moved on an application for an order of *mandamus*, prohibition or *certiorari*, as the case may be. In this case however, the Minister’s ‘final’ decision was challenged in a suit claiming, *inter alia*, a declaration that the confiscation of the ‘pop caps’, the subject of this appeal, was wrongful, unlawful and done without powers. I can see no objection to a suit for a declaration being instituted in preference to an application for the issue of an order in the nature of a prerogative writ, especially when (as in this case) the Plaintiff is seeking additional relief by way of a claim for return the confiscated goods or, alternatively damages”. What Law AVP said in regard to quashing of a decision by a person exercising quasi-judicial authority was also concurred into by Spry AP in that case. There is something to be said about the order of m*andamus* issued by the superior court. That court could have directed the Appellant to work out or calculate the pension due to the Respondent as laid down per the Constitution, the Act and Chapter 423. Instead it ordered her to pay the sum calculated as due. Ideally the superior court should have ordered her to calculate the pension due to the Respondent according to the principles laid down in the constitution and the two Acts. But that which ought to be done must be done. As the sum of pension due to the Respondent, if proper law had been applied, was not in dispute it would have been a futile exercise to ask her to recalculate the pension. Payment of pension to a retiree is not a matter of fun and games. I would dismiss this appeal with costs.

(Owuor JA concurred in the judgments of Shah JA.)

For the Appellant:

*G Muigai* instructed by *Mohammed and Muigai*

For the Respodent:

*G O Oraro* instructed by *Oraro and Co*