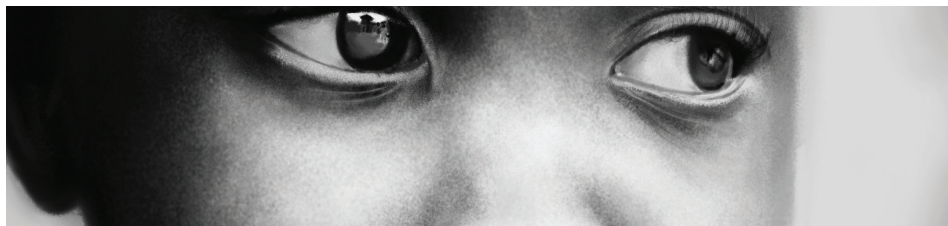


23 October 2019



## Court of Appeal rules under 18 marriage unconstitutional

- Dismissed Attorney General's Appeal
- Girls cannot be protected from sexual activities by allowing them to get married at a younger age
- Must respect international agreements and charters
- Children of whatever age are incompetent to consent to any contractual arrangement
- Minimum age to get married is 18

Today, 23 October 2019 will go down in history as a victory for women, children and human rights. The Court of Appeal handed down its decision that girls under the age of 18 years cannot get married in Tanzania.

### Background

In Miscellaneous Civil Cause No. 5 of 2016, Rebeca Gyumi, founder of Msichana Initiative, a local charity promoting girls rights petitioned before the High Court of Tanzania challenging the constitutionality of sections 13 and 17 of the Law of Marriage Act, Cap 29 R.E 2002 (LMA) which sections effectively allowed girls to marry when they are 15 years with parental consent and 14 years with the Court's permission. Rebeca claimed that, the above-mentioned sections offend the provisions of Article 12, 13 and 18 of the Constitution of the United Republic of Tanzania of 1977 (Constitution) as amended.

Rebeca also sought a declaration that the provisions of section 13 and 17 of the LMA be declared null and void, and expunged from statute and 18 years to remain the minimum marriage age until the Government amends the law.

The High Court in 2016 ruled that the provisions of sections 13 and 17 of the LMA offended the principles of equality provided for in Articles 12(1) and 13(1) of the Constitution and declared the said sections unconstitutional. The High Court directed the Government through the Attorney General, within a period of one year from the date of the decision, to correct the complained anomalies within the provisions of the said sections and in lieu thereof put 18 years as the eligible age for marriage in respect of both boys and girls. The Attorney General appealed this 2016 decision to the Court of Appeal, which appeal the Court dismissed today.

### Issues

The Attorney General raised the below grounds:

- That the Court erred in law in holding that section 13 and 17 of the Act are discriminatory for giving preferential treatment regarding the eligible ages of marriage between girls and boys
- That the Court erred in law equating the age of the child with the age of marriage
- That the Court erred in holding that customary and Islamic laws do not apply in matters of marriage stated in the Act

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# LEGAL UPDATE

**FB** ATTORNEYS

23 October 2019

- That the Court erred in law holding that with various legislative developments that have taken place, it is unexpected to have valid and competent applications filed in Court seeking leave under section 13(2) and 17(2) of the Act
- That the Court erred in law in holding that sections 13 and 17 of the Act have lost their usefulness thus they deserve to be declared null and void

## Arguments raised

The Attorney General raised the following arguments:

- Not all laws that treat people in similar situations differently can be said to be discriminatory
- There are biological differences that must be taken into account since maturity occurs at different ages and that such provisions were there to protect boys and girls
- Age is not a creation of discrimination in our Constitution and that section 13(2) and 17(2) provide safety valves
- It was wrong for the High Court to equate age of child with age of marriage
- High Court erred by holding that customary and Islamic laws do not apply in matters of marriage stated in the LMA
- High Court ignored Judge Spry report of 1969 which resulted in the LMA
- LMA is a self-executing law and other laws cannot override it
- The law has made tremendous steps in protecting interests of girls below age of 18 by outlawing sex out of wedlock for them
- High Court wrong in holding that section 13 and 17 have lost their usefulness

The Respondent raised the following counter arguments:

- Article 12(1) of the Constitution provides that all human beings are born free and are all equal
- The Appellant failed to justify why there is discrimination between boys and girls under the LMA
- Sections 13 and 17 do not assist a girl or boy below 14 years to solve problems, instead they put them in more problems
- LMA does not promote affirmative action for girls, in fact undermines girls' progress by allowing them to marry earlier even before they complete secondary education
- Biological maturity or development is not in itself indicative of readiness of marriage
- Affording girls to get married at an earlier age is not protection
- On international and regional laws, referred to African Charter on Human and People's Rights on the Rights of Women (Maputo Protocol), Convention on the Elimination of All forms of Discrimination against Women (CEDAW) and Article 21(2) of the African Charter on the Rights and Welfare of the Child, all applicable in Tanzania
- Section 2 of the Law of Child Act defines a child as an infant who has not attained 18 years of age
- Disagreed with the Appellant that LMA exists in parallel system together with customary and religious laws of marriage
- It was proper for the High Court to declare these sections unconstitutional

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23 October 2019

## The Judgment

In a judgment that goes into the history books, Justices A.G. Mwarija, W.B. Korosso and M.C. Levira dismissed the entire appeal by the Attorney General. The justices took cognizance that the LMA was enacted 48 years ago in 1971 and that the provisions were drafted to serve the purpose of the particular era, and that Tanzania is not an isolated island.

Referring to Article 16 of the Universal Declaration of Human Rights 1948, Article 1 of the Convention on the Rights of Child, 1989, Article 2 of the African Charter on the Rights and Welfare of the Child, 1990 and Article 6 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003, the Court stated that there were two underscored preceding requirements which must be taken on board to realise the right to marry. First the age must be minimum 18 years and second the test of free and full consent. The Court subscribed to the position of the Respondent that the LMA, as it is now, undermined the girl's progress. The justices further stated that the law does not subject women to any constructive outcome getting married at a younger age, and that there is no scientific proof which substantiates the narration that due to biological reasons girls should be subjected to early marriages.

The Court also held that the LMA provisions do not give equal treatment between a boy and girl child thus contravene Articles 12 and 13 of the Constitution. Further the Justices observed that the Appellants assertions on delinking marriage and age were not sound reasons, being mindful that the marriage relationship stands as a social contract therefore the age of child and age of marriage being inseparable and must be taken into account.

The Justices stated that girls cannot be protected from sexual activities by allowing them to get married at a younger age, and with the development of legislative paradigm in Tanzania, children of whatever age regardless of the kind of objective they want to achieve are incompetent to consent any contractual arrangement, and as such a girl does not acquire adult status and/or capacity because of marriage. Further the Court held that a child is a child, whether married or not, and that the High Court correctly equated the age of a child and the age of marriage.

In dismissing another ground of appeal, the Court held that the contention that the LMA exists in parallel system with customary and religious law of marriage had no merit whatsoever.

Finally, the Justices held that the High Court was correct in holding that section 13 and 17 of the LMA have lost their usefulness and thus they deserve to be declared unconstitutional. The final result, the Attorney General's appeal dismissed in its entirety meaning that the minimum age for marriage for a boy or girl is 18 years.

To read a copy of the High Court judgment, [click here](#)

To read a copy of the Court of Appeal judgment, [click here](#).

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