

FACT SHEET: LITIGATION ON CHILD MARRIAGE IN TANZANIA

The Case of *Attorney General v Rebeca Gyumi*

In 2016, Rebeca Gyumi filed a case on behalf of children at the risk of child marriage, *Rebeca Gyumi v Attorney General*, challenging the constitutionality of child marriage in Tanzania. The High Court granted the application and declared unconstitutional sections 13 and 17 of the Law of Marriage Act that set different minimum ages for marriage for boys and girls, and ordered the state to amend the law within 12 months.

According to the Act, the minimum age for marriage is 15 years for girls and 18 years for boys. Section 13 of the Act allows boys or girls to be married at 14 years with judicial permission. In terms of section 17, a girl under 18 can be married with parental consent, or if no parent is alive, guardian's consent. In the absence of parents or a guardian, no consent is required.

In the High Court

The High Court found that child marriage is contrary to the best interests of the child, as provided in the Law of the Child which defines a child as a person below the age of 18 years. The Court stated that the impugned provisions of the Law of Marriage Act allow children to enter into marriage, and that children should not be burdened with complex matrimonial and conjugal obligations, including possible serious health risks for the girl child when she marries at a young age. The Court agreed with the analysis of the Zimbabwe Constitutional court in *Loveness Mudzuru and Another v Minister of Justice and Another* (2015). The High Court also found that setting different minimum ages of marriage for boys and girls was discriminatory and contrary to the right of equality provided in the Tanzanian Constitution. In addition, the Court held that child marriage could not be justified on the basis of customary and religious norms, as it was not applicable to marriage law in Tanzania, and also because any law or custom inconsistent with the Constitution could not be upheld. The Court also stated that the law was outdated and had outlived its purpose, in the context of more recent legislative interventions that penalised sexual exploitation of children and learners.

In the Court of Appeal

The state filed an appeal against the decision of the High Court, on the following grounds:

1. That the High Court erred in finding that the law was discriminatory, and that the differentiation between girls and boys is justified on the basis that girls mature earlier than boys.
2. That the law protecting children in Tanzania should not be applicable to marriage, and so the High Court erred in equating the age of a child with the age of marriage.
3. That the High Court was wrong in finding that customary and religious laws do not apply to marriage law.

4. That the Court was wrong in deciding that the law was outdated and no longer served any purpose and should be declared null and void.

Appeal Hearing

The appeal was heard on 24 July 2019 in the Tanzania Court of Appeal, before Justices Mwarija, Korosso and Lavira. The issues before the Court are:

1. Whether or not sections 13 and 17 of the Law of Marriage Act are discriminatory in their effect between boys and girls, and if the differentiation could be justified on the basis of perceived biological differences between boys and girls.
2. Whether or not child marriage is in line with the Constitution and laws protecting children in Tanzania.
3. Whether or not the High Court was correct in finding that customary and religious laws do not apply to the law of marriage
4. Whether or not the impugned law should have been declared null and void for no longer being relevant, and whether or not the law had indeed outlived its purpose.

The Court has reserved judgment.

Importance of the Case

It is estimated that 37% of girls in Tanzania get married before they reach 18 years of age.¹ Child marriage is a problem because it leads, amongst other things, to lost educational and career opportunities, high risk of contracting STIs and HIV, psychological stress, economic insecurity and perpetuation of poverty, sexual abuse, physical and emotional abuse, maternal and infant mortality and teen pregnancy.²

Regional and international instruments to which Tanzania is party require the enactment by member states of laws that set the minimum age of marriage at 18 years of age. The African Charter on Human and people's Rights Protocol on the Rights of Women ("Maputo Protocol") requires that men and women should be equal partners in a marriage, having given informed consent to the marriage. Such consent can only be given by adults—that is, adults over the age of 18 years. The Protocol therefore sets the minimum age of marriage to be set by law in each state at 18 years of age. The SADC Model Law on Eradicating Child Marriage (2016) requires states to enact legislation prohibiting child marriage where one of the parties is under 18 years. In addition, the African Charter on the Rights and Welfare of the Child requires states to prohibit betrothal and marriage of children and to specify a minimum marriage age of 18 years in legislation.

¹ Tanzania Demographic and health Survey and Malaria indicator Survey 2015-16, Ministry of Health, Community development, Gender, Elderly and Children, December 2016, 87.

² *Child Marriage in Tanzania at a Glance*, Ministry of Health, Community Development, Gender, Elderly and Children, March 2017, 20.