

# THE FIGHT TO END CHILD MARRIAGES IN TANZANIA

THE COURT CASE OF REBECA GYUMI







# Introduction

*Advocate Jebra Kambole, counsel for the petitioner*

*“All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.”*

– Constitution of Tanzania, article 13<sup>1</sup> –

The Tanzania Constitution says that all human beings are born free and equal and that every person is entitled to dignity (article 12). It further states that all persons are equal before the law and are entitled, without discrimination, to protection and equality before the law. Laws which allow men and women to marry at different ages are discriminatory and violate the right to equality before the law.

Various regional instruments require that States enact legislation that sets the minimum age of marriage at 18 years of age:

<sup>1</sup> See also the Universal Declaration of Human Rights, article 7, International Covenant on Civil and Political Rights, article 26, African Convention on Human and Peoples’ Rights, articles 3 and 19.

The African Charter on Human and People's Rights' **Protocol on the Rights of Women** says that men and women should be equal partners in a marriage and both parties must have given informed consent.<sup>2</sup> Consent can only be provided by adults – that is, adults over the age of 18 years. Therefore, the Protocol requires that the minimum age for marriage should be set by legislation in each State at 18 years of age.<sup>3</sup>

The **SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage** of 2016 says that legislation should prohibit marriage where one of the parties is under the age of 18 years.

*“Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.”*

– Article 21(2) of the *African Charter on the Rights and Welfare of the Child* –

## The Problem of Child Marriage

In Tanzania, the **Law of Marriage Act** of 1971 does not prohibit child marriages. It is estimated that 37 percent of girls in Tanzania are married before they reach 18 years of age.<sup>4</sup>

Poverty, socio-cultural norms and traditions, gender discrimination and reputational risk all contribute to child marriage.<sup>5</sup> Child marriages lead to lost educational and career opportunities; contracting HIV or STIs; psychological distress; economic insecurity and continued poverty; lack of autonomy; sexual abuse; physical and emotional abuse, verbal abuse; infant mortality; maternal mortality; miscarriage and teenage pregnancy.<sup>6</sup>

<sup>2</sup> African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, article 6 ('Maputo Protocol').

<sup>3</sup> Maputo Protocol, article 6.

<sup>4</sup> Tanzania Demographic and Health Survey and Malaria Indicator Survey 2015-16, Ministry of Health, Community Development, Gender, Elderly and Children, December 2016, 87.

<sup>5</sup> Child marriage in Tanzania at a glance, Ministry of Health, Community Development, Gender, Elderly and Children, March 2017, 5-6.

<sup>6</sup> Child marriage in Tanzania at a glance, 20.



*Rebeca Gyumi, petitioner, speaking to the media outside court at the start of the case*

In Tanzania, Rebeca Gyumi brought a case on behalf of all children at risk of child marriage. The case of **Rebeca Gyumi v Attorney General Miscellaneous Civil Case No.5 of 2016** (the 'Rebeca Gyumi' case), challenged the constitutionality of child marriage in Tanzania. As a result, the Tanzania High Court struck down as discriminatory and unconstitutional sections 13 and 17 of the Law of Marriage Act that set different minimum ages for marriage for boys and girls.



IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO 5 OF 2016

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF  
TANZANIA 1977 – AS AMENDED FROM TIME TO TIME [CAP. 2 R.E.  
2002]

AND

IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT ACT  
[CAP 3 R.E. 2002]

AND

IN THE MATTER OF A PETITION TO CHALLENGE CONSTITUTIONALITY  
OF SECTION 13 AND 17 OF THE LAW OF MARRIAGE ACT (CAP 29 R.E.  
2002)

BETWEEN

REBECA Z. GYUMI.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Date of Last Order: 3/3/2016

## Challenging the Law Relating to Child Marriage

The Tanzanian **Law of Marriage Act**<sup>7</sup> (the Act) sets out the requirements for individuals to enter into marriage. According to the Act, the minimum age for marriage is 15 years for girls and 18 years for boys.<sup>8</sup> Section 13 of the Act allows boys or girls to be married as early as 14 years of age, where the court gives permission.

Section 17 of the Act provides that in the case of marriage of a girl under 18 years of age, her father must give consent for such marriage, or if her father is dead, her mother. If both parents are dead, the guardian must give consent, unless there is no guardian, in which case no consent is required.

### *Rebeca Gyumi challenged the Act on the basis that:*

1. It was in breach of article 12 of the Tanzanian Constitution, which guarantees equality before the law;
2. It was in breach of article 13 of the Tanzanian Constitution, which protects against discrimination on the basis of sex;
3. Persons under 18 years of age are children and do not have the capacity to provide their free and informed consent to marry;
4. It is in breach of article 21(2) of the Constitution in not allowing girls the opportunity to participate fully in decisions which affect their lives; and
5. It denies children the right to education and freedom of expression.

On 8 July 2016, Judges Lila J, Kihio J and Munisi J held that sections 13 and 17 of the Law of Marriage Act were outdated and unconstitutional.

The following are the key findings from the High Court's decision.

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<sup>7</sup> The Law of Marriage Act (Cap 29 R.E. 2002) ('The Law of Marriage Act' or 'the Act').

<sup>8</sup> The Law of Marriage Act, section 13(1).



## Child Marriage is Contrary to the Best Interests of the Child

The **Law of the Child Act** defines a child as a person below the age of 18 years.<sup>9</sup> The Court held that sections 13 and 17 of the Law of Marriage Act allows children to enter into marriage. The Court held that it was undesirous to subject a child to complex matrimonial and conjugal obligations.<sup>10</sup> The Court further took note of the serious health risks the girl child is exposed to if married at a young age.<sup>11</sup>

The High Court said that it subscribed to the Zimbabwe Constitutional Court's analysis in the **Loveness Mudzuru** case:<sup>12</sup>

*"In light of the overwhelming empirical evidence on the harmful effects of early marriage on girl children, no law which authorises such marriage can be said to do so to protect 'the best interests of the child'. The best interests of the child would be served, in the circumstances, by legislation which repealed [the section which allows child marriage]. By exposing girl children to the horrific consequences of early marriage in clear violation of their fundamental rights as children, [the Act] is contrary to public interest in the welfare of children. Failure by the State to take such legislative measures to protect the rights of the girl-child when it was under a duty to act denied the girl children subjected to child marriages the right to equal protection of the law."<sup>13</sup>*

*"Girl children are entitled to effective protection by the Court which is the upper guardian of the rights of children and whose duty it is to enforce the fundamental rights designed for their protection."<sup>14</sup>*

<sup>9</sup> Act No. 21 of 2010, section 4.

<sup>10</sup> *Rebeca Gyumi v Attorney General*, 19.

<sup>11</sup> *Rebeca Gyumi v Attorney General*, 19.

<sup>12</sup> *Loveness Mudzuru & Ruvimbo Tsopoddz v Minister of Justice Legal & Parliamentary Affairs and Others*, Constitutional Application No. 79 of 2014, judgment 20 January 2016 ('Loveness Mudzuru').

<sup>13</sup> *Loveness Mudzuru*, 50.

<sup>14</sup> *Loveness Mudzuru*, 53.



## Right to Equality before the Law and Freedom from Discrimination

*“(W)e subscribe to the settled position that the provisions which give differential treatment to persons in a similar situation are discriminatory hence offending the principle of equality contemplated under Article 12(1) and 13(1) & (2) of the Constitution.”<sup>15</sup>*

The High Court focused on the right to equality before the law and the right to freedom from discrimination, which are protected by articles 12 and 13 of the Tanzanian Constitution.

Munisi J stated that the provisions in the Act treat men and women differently in two ways. Firstly, the age for marriage is different between men and women. Secondly, women under 18 years require the consent of their parents to marry, whereas men do not. This difference in treatment means that women and men are not treated equally under sections 13 and 17 of the Law of Marriage Act. The sections were therefore held to discriminate against women and were in violation of articles 12 and 13 of the Constitution.

This is significant in that the Court recognised the notion of equality between men and women is now universally accepted and was able to utilise national and regional laws to uphold it.

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<sup>15</sup> *Rebeca Gyumi v Attorney General*, 19.

## Customary Laws are not a Justification for Child Marriages

The State tried to justify the law allowing child marriages on the basis that it was a compromise to accommodate disparities in customary, traditional and religious values on marriage. The Court disagreed since section 11(4) of the Tanzanian Judicature and Application of Laws Act states that *“the rules of customary law and the rules of Islamic law shall not apply in regard to any matter provided for in the Law of Marriage Act”*.<sup>16</sup>

In addition, the Court argued that sections 13 and 17 of the Law of Marriage Act were unconstitutional because they were inconsistent with the country's international obligations. Tanzania ratified the African Charter on the Rights and Welfare of the Child (ACRWC) which prohibits child marriage, obliges States to set the minimum age of marriage at 18 years of age, and requires States to take appropriate steps to eliminate harmful social practices against children.<sup>17</sup>

The Court referred with approval to the principles cited in the Zimbabwean case of **Loveness Mudzuru**.<sup>18</sup> Malaba DCJ in that case, in commenting on article 21 of the ACRWC, stated as follows:

*“In clear and unambiguous language, Article 21 of the ACRWC imposed on States Parties, including Zimbabwe, an obligation which they voluntarily undertook, to take all appropriate measures to eliminate harmful social and cultural practices affecting the dignity, normal growth and development of the child. The Charter goes on to specifically target child marriage as such a harmful social and cultural practice affecting the welfare, dignity, normal growth and development of the child particularly the girl-child. The States Parties are placed under a positive obligation to take effective measures, including legislation, to specify the age of eighteen years as the minimum age for marriage. They are obliged to abolish child marriage.”*<sup>19</sup>

<sup>16</sup> Judicature and Application of Laws Act (Cap 358 R.E. 2002), section 11(4).

<sup>17</sup> African Charter on the Welfare of the Child (1990), article 21 (Protection against Harmful Social and Cultural Practices).

<sup>18</sup> *Loveness Mudzuru & Ruvimbo Tsopoddz v Minister of Justice Legal & Parliamentary Affairs and Others*, Constitutional Application No. 79 of 2014.

<sup>19</sup> *Loveness Mudzuru*, 36.

Referring to the horrific, social and health impacts of child marriage, the Tanzania High Court rejected the State's argument that they must take into account customary principles when deciding on the constitutionality of the provisions.

*"(W)e are not persuaded by the respondent's view that customary practices that have the effect of affecting children adversely will still intend well for those children."<sup>20</sup>*



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<sup>20</sup> *Rebeca Gyumi v Attorney General*, 22.

## The Right to Participate in Decisions which Affect Your Life

A fundamental part of the right to self-determination is the freedom to participate in decisions affecting your life.<sup>21</sup> For children, many of these decisions are made by their parents on their behalf, supposedly with their best interests at heart. This is because children – people under 18 years of age – are not yet considered to have the ability to make many of the important decisions which will affect the rest of their lives.

The High Court held that the Maputo Protocol encourages State Parties to enact legislative measures to ensure that no marriage takes place without the free will and full consent of both parties and that the minimum age of marriage for women should be 18 years.

*“Tanzania having ratified the said Regional Instrument, it is high time that it takes the appropriate legislative measures to ensure that the rights guaranteed under Article 21(2) of the Constitution are realised by all.”<sup>22</sup>*

Requiring that women under the age of 18 years must have the consent of a parent or guardian to be married is in conflict with Tanzania’s obligations under the Maputo Protocol, which require that both men and women provide their full and informed consent to a marriage.<sup>23</sup> People under 18 years of age cannot provide their free and informed consent, therefore these provisions conflict with Tanzania’s international obligations.

<sup>21</sup> See International Covenant on Civil and Political Rights, article 1; Constitution of Tanzania, article 21(2).

<sup>22</sup> *Rebeca Gyumi v Attorney General*, 20.

<sup>23</sup> Maputo Protocol, article 6.

*"(H)aving found that a girl under 18 years is a child in all respects we are in agreement that it is un-desirous to subject her to complex matrimonial and conjugal obligations."*<sup>24</sup>

The High Court held that section 17 is unconstitutional on the basis that it prevents women from exercising their right to fully participate in decisions which affect them under article 21(1) of the Tanzanian Constitution. In order to give effect to both this right and Tanzania's international obligations, the Court decided that the minimum age for marriage should be 18 years of age for both men and women.

## The Law is No Longer Useful

The High Court held that the sections of the Law of Marriage Act which allow child marriages are no longer useful.

The Court noted that many legislative developments have taken place since the Law of Marriage Act. These developments were presumably to ensure "that the welfare and protection of the girl child is enhanced and the dignity and integrity of women is generally safeguarded".<sup>25</sup> For example, the Sexual Offences Special Provisions Act (SOSPA) of 1998 imposes criminal sanctions on people who have sexual relations with children. Allowing child marriage would therefore amount to sanctioning criminal activity.

The Court held that in the light of legislation such as SOSPA and the Law of the Child Act, the government has through such laws passively conceded that children's right to be protected outweighs any need to maintain child marriages.<sup>26</sup>

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<sup>24</sup> *Rebeca Gyumi v Attorney General*, 19.

<sup>25</sup> *Rebeca Gyumi v Attorney General*, 23.

<sup>26</sup> *Rebeca Gyumi v Attorney General*, 24.



## Conclusion

*Msichana team on the day they received the landmark judgment*

The Court in the Gyumi case ordered the government to amend the law within one year by correcting the discrimination in sections 13 and 17 and establishing 18 years as the eligible age for marriage in respect of boys and girls. The Rebeca Gyumi case is a significant victory. It affirms that women should have the right to consent to marriage and that the minimum age for marriage should be 18 years of age for both men and women. It also solidifies the position that customs and practices should not be used to discriminate against women or deprive women of their rights.

Since the judgement, the State has repeatedly emphasised that law reform requires lengthy consultation. Prolonged law reform process, however, makes the State complicit in the violation of children's rights. The State served the petitioner with a notice of its intention to appeal against the decision two weeks after the judgment **BUT** has not formally filed papers for an appeal yet.

**Cover image:**

*Former child brides who are championing the end of child marriages in their communities with Rebeca Gyumi. They travelled from Shinyanga to receive the judgment on 25 June 2016. Unfortunately, the reading was postponed to 8 July 2016.*





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