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

Date of Judgment: 8/7/2016

Munisi,J

The petitioner, Rebecca Z. Gyumi through her counsel has by originating summons filed an application under the provisions of Article 26(1)(2) and 30(3) of the Constitution of the United Republic of Tanzania (hereinafter referred to as the Constitution), Sections 4 and 5 of the Basic Rights and Duties Enforcement Act, Cap 3 R.E. 2002 and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules 2014. Through the said laws, the petitioner is challenging the constitutionality of the provisions of section 13 and 17 of the Law of Marriage Act, Cap 29 R.E. 2002 (herein after referred to as the Act). Specifically she is seeking a declaration that:

(a) The provisions of section 13 and 17 of The Law of Marriage Act (Cap 29 R.E. 2002), are unconstitutional for offending the provisions of Article 12, 13 and 18 of the Constitution of the United Republic of Tanzania of 1977 as amended

(b) That the provisions of section 13 and 17 of The Law of Marriage Act (Cap 29 R.E. 2002), be declared null and void, and expunged from statute and 18 years age should remain for both until the government amend the law.

According to the petitioner, the above prayers are rooted on four main grounds; namely:

a. The provisions of sections 13 and 17 of The Law of Marriage Act (Cap 29 R.E. 2002) which provide for different age of marriage between boys and girls, and the requirement of parental consent contravening the right to equality, as provided for under the Constitution of the United Republic of Tanzania of 1977 as amended.

b. The provisions of sections 13(1)(2) of The Law of Marriage Act (Cap 29 R.E. 2002) which allow female person to get married at the age of fourteen years and while the male should get married at the age of 18 years and above is discriminatory provision thus contravening the right against discrimination as provided for under the constitution of the United Republic of Tanzania of 1977 as amended.

c. The provisions of section 17 of The Law of Marriage Act (Cap 29 R.E. 2002) which allow child of 15 years of age to get married by the consent of the father, mother, guardian or court show that all human beings are not equal and someone can decide on behalf of another thus contravening the right against equality and dignity of a person, and right against discrimination as provided for under the United Republic of Tanzania of 1977 as amended.

d. The provisions of section 13(2) of The Law of Marriage Act (Cap 29 R.E. 2002) which require leave of the court for the marriage of the person at the age of 14 years but the provision is too vague and can be arbitrary (sic) interpreted and denial (sic) children right to education

which is a cornerstone of the freedom of expression as provided for under the United Republic of Tanzania of 1977 as amended.

Having looked at the petition and the grounds for determination drawn thereto by the petitioner, we are satisfied that the intended litigation is on behalf of children, a category of people which is vulnerable in society. Further, the acts complained about are likely to impact more on children from poor and socially disadvantaged families. Furthermore, having looked at the reliefs sought, we think they constitute reasonable and effective means for the enforcement of the fundamental rights of the girl children subjected to early marriages.

Upon being served with the petition, the Respondent, the Attorney General filed a reply in which it was strongly resisted that the provisions provided for any infringement of the children's fundamental rights.

When the petition was called on for hearing on 3/3/2016 this court ordered the same to be heard by way of written submission and accordingly set a schedule for the parties to file their respective submission. We are thankful to the learned counsel who duly complied with our order and filed their submission which we have found to be very resourceful timely.

Having given due scrutiny to the elaborate submission filed by the learned counsel from both sides, we are satisfied that the four issues framed by the petitioner to assist in determining the two

orders sought in the petition are closely intertwined hence to avoid confusion and unnecessary repetitions we intend to address the matter holistically. In our considered view, the four issues raised will find their respective answers as we traverse through the impugned provisions and the constitutional Articles alleged to have been infringed. As observed from the respondent's reply submission the same approach has been adopted. We believe the approach will make the decision more reader friendly.

In his lengthy, but very resourceful written submission, Mr. Jebra Kambole, learned counsel prefaced it with a brief background of the Law of Marriage Act. He argued that the enactment intended to regulate the laws relating to marriage, personal and property rights as between husband and wife, separation, divorce and other matrimonial reliefs and other matters connected and incidentals thereto. In that context, the learned counsel reasoned that despite the well spelt out intentions, the legislation has retained provisions which are incompatible with the constitutional challenges in that there are provisions in it that infringes the basic constitutional guarantees enshrined in the Constitution.

Addressing the 1st issue which in our view embraces all the aspects pertaining to this petition i.e. **whether the requirement for parental/guardian/court consent for a girl below 18 years provided under section 13 and 17 of the Act before any intended marriage contravenes the right to equality set out in Article 12 of the constitution**; the learned counsel strongly contended that the right to equality is infringed by the two challenged provisions

because they allow a girl of the age of 15 years to enter into marriage at an age when she cannot make decisions for herself. Relying on the definition of the child adopted by different laws such as section 4 of the Employment and Labour Relations Act, No 6 of 2004; section 4 of the Law of the Child Act, No 21 of 2010 and even the law of Marriage Act itself, the learned counsel is emphatic that the laws have without exception defined a child to mean a person under the age of 18 years old. In that regard, he argued that, based on the definition he wondered how such Act would retain provisions that allow persons it had already defined as children to enter into marriage.

Elaborating further, Mr. Kambole has argued that due to their age, children are vulnerable thus deserve protection from enormous commitments and undertakings reserved for adults. He added that apart from serious matrimonial obligations and responsibilities, children marriages attract complex health hazards which are incompatible with the best interest of a girl child.

Expounding further on the issue, the learned counsel observed that since from various laws there is a consensus that a person under the age of 18 years is a child, by simple logic, such person has no capacity to enter into a lawful marriage contract on account of want of competence which ironically has turned out to be the justification for the consent requirement. On another score the learned counsel criticized the provisions of section 17(1) of the Act, arguing that despite the explicit requirement of parental/guardian consent provided for under the said section before a girl child

could enter into marriage, the same provision waives such requirement, whereby the parents or guardian are unavailable which by necessary implication has the effect of exposing such child to uncontrolled child marriage. In that regard the learned counsel argued that the said provisions are unconstitutional as they infringe Article 12 of the Constitution which guarantee the right to equality and dignity of human beings. Additionally the learned counsel has contended that, such infringement constitutes further serious abrogation because the girl child is not free to choose her life partner without seeking consent from the parent or guardian. In that respect, he argued, it would have made more sense if the law did not allow girl child marriages until they attain the majority age of 18 years whereby at that point in life, they would legally be able to make their own decisions similar to their male counterparts.

The learned counsel further criticized the two provisions arguing that they are discriminatory as they differentiate between boys and girls with regard to the eligible age for marriage, in that while for boys the eligible age is 18 years, for girls the age is set between 14 and 15 years. Also he argued that there is discrimination between girls with parents and those without parents arguing that those with parents/guardian will get consent, while those without parents are treated differently. He maintained that a law that treats people differently under similar circumstances has always been held to be discriminatory. To cure the anomaly, he proposed that the best remedy is to do away with the requirement for consent and declare the eligible age for marry to be18 years. This

he argued will be in accord with the right to freedom enshrined in the constitution under Article 21(2) of the Constitution.

With regard to the remaining issues, the learned counsel maintained that the right to protection against discrimination as guaranteed under the provisions of Article 13(2)(2)(3)(4) and (5)of the Constitution are infringed by the application of section 13(1) and (2). To cement his proposition, the counsel for the petitioner has invited the court to look at some International and Regional instruments that supports the fight against discrimination. The learned counsel is emphatic that they all are in accord with the constitutional intentions to preserve and uphold human dignity intended to eliminate discrimination. To that end, he cited among others; Universal Declaration of Human Rights (UDHR), Article 26 of the International Covenants on Civil and Political Rights (ICCPR), Article 2 of the Convention on the Elimination of All Forms of Discrimination against women (CEDAW), Articles (1)(2) of the Convention on the Rights of the Child (CRC), Article 3 of The African Charter on the Right and Welfare of the Child (ACRWC), Article (2) Of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). According to the petitioner's counsel, Tanzania is a signatory to almost all the referred instruments. Adding that, they all contain provisions that encourage Member States to adopt legislation that advocates for equality and total elimination of all forms of discrimination.

On a different note, the learned counsel invited us to seek inspiration from a Zimbabwean decision which deliberated on similar provisions, i.e. **Loveness Mudzuru & Ruvimbo Tsopoddz V Minister of Justice Legal & Parliamentary Affairs and Others, Constitutional Application No. 79 of 2014** (unreported)), and declare unconstitutional the two provisions. He added that it is high time that the two provisions are declared obsolete by the court as they have lost their usefulness.

In conclusion, the counsel prayed for the provisions of section 13 and 17 of the Act to be declared null and void consequently be expunged from the law books and thereafter declare 18 years as the age of competence and eligible for both girls and boys in entering into marriage without any exception.

In an equally formidable written submission filed on behalf of the Attorney General, the respective learned Principal State Attorney strongly resisted the allegations, responding to the petitioner's four framed issues cumulatively. The learned counsel while joining hands with the petitioner with regards to the objects of the Law of Marriage Act enacted in 1971, she contended that the enactment came up as the Government response to sentiments aired by the public through White Paper No. 1 of 1969. In that regard, the Act reflected the will of the people at that time as reflected in Lord Justice Spry's report in respect of matters relating to customary, traditional and religious beliefs. The learned counsel added that the Act came up as a compromise legislation to address and accommodate the existing disparities in customary, traditional and

religious values from divergent communities pertaining to marriage and related issues. For that reason, argued the counsel, enactment of those provisions had a firm foundation.

Responding to the issue whether the provisions of section 13 and 17 of the Act contravenes the provisions of Articles 12, 13(1)(2)(3)(4)(5) and 18 of the Constitution, the learned Principal State Attorney argued that it is apparent from the background given that the issue been challenge is delicate as it touches on customary and religious beliefs, in that regard it has no easy fix. She elaborated that it is important to note that the 1971 enactment was a result of protracted debate which revolved around divergent issues with peculiar cultural and religious values one of which was the minimum age to enter into marriage. Relying on the provisions of section 11 of the Judicature and application of laws, Act, Cap 358 R.E. 2002, and the Local Customary Law (Declaration) Order, GN 279; she argued that the law allows each ethnic group to follow and make decisions based on its customary norms, traditions and religious values.

Reacting to the contention that the provisions of section 13 and 17 of the Act are unconstitutional on the ground of discrimination, the learned counsel strongly resisted the claim on the main ground that the Act has set out a safety mechanism in the form of leave under subsection 13(2)&(3). Insisting therefore that, the law provides for sufficient protection of obtaining court's leave before the said marriages could be contracted. In any event, she argued, since subsection (3) refers to "persons" and not only the girl child,

there is no discrimination because boys too could seek court's leave if they wish to marry at the age below 18 years as long as they are above 14 years and there are special circumstances necessitating the contracting the intended marriage.

The respondent's counsel further dismissed as baseless the complaint that the provisions of section 13(2) of the Act are too vague and susceptible to being interpreted arbitrarily, thus deny the girls under the age of 18 years the right to education which the petitioner has referred to as a cornerstone to freedom of expression guaranteed under Article 18 of the Constitution. Referring to the provisions of section 35(1) of the National Education Act, Cap 353 R.E. 2002, the learned counsel argued that through the compulsory primary education, parents have a duty of ensuring that their children aged 7 years old are enrolled and attend school until the conclusion of the primary level. In that regard, she argued, it is not expected for a parent to give consent for a marriage to the child before such child completes his/her primary education, which by that time they might then be at the age of majority capable of making their own decisions.

With regard to the complaint that the provisions of section 13(2) vests uncontrolled discretion to the court in granting leave which powers might be arbitrarily interpreted, it is the respondent's argument that the apprehension is baseless because courts' powers are defined by statutes thus implying that they will abuse powers without any fact to substantiate the allegation is unjustified. The learned counsel added that by virtue of Article

107A (1) of the Constitution courts have been designated to be the final authority for dispensing justice and they are to act with impartiality. In that context, there is every reason to believe that the courts which are manned by competent professionals will take regard and be guided by the principle of the "best interest of the child" while deliberating on matters pertaining to children including those falling under section 13(2). The learned counsel attacked this point further, arguing that the petitioner's point taken on its face value amounts to labeling the judiciary to be an incompetent institution that does not understand its mandates, an accusation which has no justification.

The respondent has also dismissed as baseless the claim that the right of freedom of expression and the right to receive information is necessarily infringed by failure to obtain education, arguing that no evidence has been advanced to support such serious allegation. In any event, the counsel argued that there are boys and girls in the communities who had by choice neglected to use the opportunity to attend school and yet they have been enjoying their right of freedom of expression and receipt of information without any hindrance thus de-linking the alleged direct connection between the two. In winding up her argument, it is the respondent's submission that it is not necessarily the case that a person has to attend the conventional school to be able to realize ones right to freedom of expression or of receiving information.

On another score, the respondent's counsel faulted the mode of interpretation adopted by the petitioner in interpreting the two

impugned provisions arguing that to get the proper context of the said provisions; the two sections should be read together with the rest of the provisions to get the intended meaning. This, she argued has been the principle set by the Court of Appeal in the case of **Christopher Mtikila V. The Attorney General, Misc. Civil Cause No. 10 of 2005** (unreported) in which the Court set out guidance on how to construe statutes. In that regard, she argued that to appreciate the full import and context of section 17, one has to read the legislation by starting from its preceding sections. Relying on the case of **Attorney General V W.R. Butambala (1993) TLR 51,** the learned Principal State Attorney raised caution of the danger of knocking down laws or potions of them without sufficient justification amidst some administrative efforts by the executive to rectify the pointed out anomalies.

With regard to the cited Regional and International Instruments, the learned counsel conceded that indeed some advocate the stances argued by the petitioner, but there are few ones that provide for exceptions set out by the challenged provisions. Citing in support of this proposition the SADC Protocol on Gender and Development of 2008 which states in article 8(2) that:

> 8(2)(a) ***Legislation on marriage shall ensure that no person under age of 18 shall marry unless otherwise specified by law, which takes into account the best interest and welfare of the child.***

Relying on Article 13(5) of the Constitution, the respondent's counsel has argued that age is not one of the consideration set for

assessing discrimination hence the contention by the petitioner that Article 13 has been infringed has no merit. The learned counsel in what seems to us to be a concession, has invited us to take note that the Law of Marriage Act has been a subject of debate lately and already the government has instructed the Law Reform Commission to look into the impugned provisions with a view of addressing the apparent and looming concerns. Without providing any material to support the move, the learned counsel is emphatic that this is sufficient to demonstrate that the government is working on the problem and that in her view it is the appropriate way to deal with the issue in view of its nature which touches on the people's traditions, cultural and religious norms. In that respect, she concluded by praying that in the event the court will agree with the petitioner and grant the petition, regard should be paid to the efforts already underway to remedy the situation, in which case, under Article 30(5) of the Constitution or section 13(2) of the Basic Rights and Duties Enforcement Act Cap 3 RE 2002 the court should afford the government time to finalize the work which it has started to rectify the anomalies complained about. She thus prayed for the petition to be dismissed in its entirety with costs.

In a brief rejoinder, the petitioner's counsel basically reiterated his submission in chief urging the court to adopt liberal interpretation and give broad interpretation to the impugned provisions so as to give them the intended effect and ensure the enjoyment of the guaranteed rights in line with the principles set in **DPP V Daudi Pete (1993) TLR 22, Kukutian Ole Pumbun and Another V Attorney General and Another (1993) TLR 159** and **Julius Ishengoma Francis**

Ndyanabo V Attorney General, Civil case No 64 of 2001, or [2001] 2EA 485 (CAT).

From the above cited cases, the learned counsel maintained his earlier position that in interpreting the provisions of section 13 and 17 of the Act, what the court need to look at is mainly whether the right to equality, right against discrimination, equality before the law and right to education which are the corner stones of freedom of expression are realized in the application of those provisions. The learned counsel insisted further that the constitutional guarantees continue to be infringed even today making reference to a newspaper article carried out in the Mwananchi Newspaper issue of 20/3/2016 which gives an account of the arrest of a 70 year old man from Rukwa Region following his act of getting married to a 14 year old girl. In that regard the learned counsel is emphatic that the observed discrimination inflicts more harm to girls than boys hence it cannot pass the proportionality test as observed by the Court of Appeal in the case of **Kukutia ole Pumbun and Another V Attorney General and Another (1993) TLR 159.** With regard to the issue of arbitrary interpretation of section 13(2) of the Act the learned counsel maintained that the way it is couched, it is open for such interpretation.

It is now our turn to address the learned counsel's submission and determine the merits of this petition. As intimated earlier on, we propose to deal with the matter holistically as far as it is possible. In our view, the main issue is **whether the provisions of section 13 and 17 of the law of marriage Act which require consent of parents or**

court for girls below 18 years before marriage, contravenes the rights to equality, right to expression and receipt of information as provided for under Article 12, 13, 18 and 21 of the Constitution of the United Republic of Tanzania as amended. The impugned provisions provides as follows:

S.13(1) *No person shall marry who, being male, has not attained the apparent age of eighteen years or, being female, has not attained the apparent age of fifteen years.*

(2) Notwithstanding the provisions of subsection (1), the court shall, in its discretion, have power, on application, to give leave for a marriage where the parties are, or either of them is, below the ages prescribed in subsection (1) if-

(a) each party has attained the age of fourteen years; and

(b) the court is satisfied that there are special circumstances which make the proposed marriage desirable.

(3) A person who has not attained the apparent age of eighteen years or fifteen years, as the case may be, and in respect of whom the leave of the court has not been obtained under subsection (2), shall be said to be below the minimum age of marriage.

S.17-(1) A female who has not attained the apparent age of eighteen years shall be required, before marrying, to obtain the consent-

(a) of her father; or

(b) if her father is dead, of her mother; or

(c) if both her father and mother are dead, of the person who is her guardian, but in any other case, or if all those persons are dead, shall not require consent.

Having studied the above provisions, the use of the word "apparent" in section 13(1), (3) and 17(1) has caught our attention and made us wonder whether it carries any particular significance vis a vis its literal meaning which is simply – **visible, manifest or obvious** – as per the *Black's Law Dictionary (9th ed.)* definition. Having looked at the construction of the word "the child" as provided under section 4 of the Law of the Child Act No. 21 of 2010, which is "**a person below the age of eighteen years,**" we are satisfied that the use of the word "apparent" in section 13 and 17 of the Act is redundant and carries no significant meaning to detain us, as such, we will leave it to the drafters to take it up if at all it has any special meaning.

Close reading of the above provisions gives us divergent imports including; that they indeed permit persons under the age of eighteen years who by definition are children to enter into marriage (S. 13(1)&(2) **i.e.** –girls at 15 years or even 14 years) while for boys it is 18 years or 14years; it is thus true that the provisions gives differential treatment between girls and boys as far as the eligible age for marriage is concerned. Also that court's leave is required before persons under the age of 14 could enter into marriage. In addition, under section 17 parental/guardian or court's consent is necessary for a girl under 18 years to enter into

marriage. Having given serious consideration to these provisions, we have noted that while on one hand the law allows a girl child to marry at 15 years, under section 17, before doing so she has to obtain a parental/guardian or court's consent. We have failed to find any meaningful rationale for the requirement taking regard to section 13(1) of the Act which explicitly sets out 15 years as the girl's eligible age for marriage. The only inference we can draw is that even the law itself had reservations on the capacity of the child to make own decision to enter into marriage be it girls or boys.

We have taken note of the definition of the child provided in various laws some of which have been pointed out in Mr. Kambole's submission including; the Act itself, the Labour Relations Act and the Child Act, the respondent has not provided us with any contrary definition. Further to this, the provisions of section 130(2)(e) of the Penal Code also recognizes as a defence a claim that a woman alleged to have been raped was a wife to a man accused of raping her. In that regard, we are in agreement with the petitioner that indeed the impugned provisions permits persons defined as children to enter into marriage. This recognition is in our view the reason why the same law has also provided for a safety mechanism of ensuring consent is obtained before the desired marriages could be effected. We also agree with the petitioner that it is glaring from the provisions of section 13(1) that it gives preferential treatment with respect to the eligible ages of marriage between girls and boys in that for boys the eligible age is eighteen years while for girls it is fifteen years. To that end we are also in

agreement with the petitioner and we 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. The two provisions provides, thus:

> *12.-(1) All human beings are bom free, and are equal.*
>
> *13.-(1) All persons are equal "before the law and are entitled, without any discrimination, to protection and equality before the law.*
>
> *(2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.*

With regard to the issue whether the requirement for obtaining parental/guardian consent for a girl under 18 years impacts adversely to a girl child; having 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. We have also taken note of the serious health risks the girl child is exposed to, once married at such young age as per the reports attached to the petitioner's written submission and the in-depth analysis carried out by their Lordships in **Loveness Mudzuru's** case which analysis we wish to associate ourselves with.

We have looked with keen interest the petitioner's argument that girls under 18 years are not free because if they want to get married, they have to seek leave from the court, for that reason;

they are not free agents to make their own decisions hence infringing their rights under the two articles referred to herein above. We are thus in agreement with the petitioner that indeed the right to equality is negated where there is a differential treatment. **The Maputo Protocol formed under the African Charter on Human and Peoples' Rights** referred to us by the petitioner's counsel, in its Article 6 encourages State parties to ensure that there is equality between men and women and both are regarded as equal partners in marriage. The Article provide further that State parties should enact appropriate legislative measures that guarantee that no marriage takes place without the free will and full consent of the both parties and that the minimum age of marriage for women should be 18 years. It is in that respect that we agree with the petitioner that 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 realized by all, Article 21(2) provides:

> 21(2) - ***Every citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation.***

On another score, we wish to express our disagreement to the respondent's argument that due to the well intentions of the impugned provisions judicial process is not the appropriate recourse to address it. The grounds relied upon by the learned Principle State Attorney are basically those associated with cultural

and religious beliefs. Having closely gone through the provisions of section 11 of the Judicature and Application of Laws Act, Cap 358 RE 2002 we are satisfied that it prohibits the application of customary law and rules of Islamic law in the Law of Marriage Act. That been the case, the argument by the respondent has no legs to stand taking regard that the impugned provisions have been codified under the law of Marriage Act. Subsection (4) of Cap 358 provides:

> 11(4) – ***Notwithstanding the provisions of this Act, 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.***

With such clear wording of the provision, it is our considered view that the argument that the two provisions should be spared on account of values embedded in customary law and rules of Islamic law is invalid and cannot stand. On this stance we have sought inspiration from some of the International and Regional Instruments which Tanzania has ratified, particularly the African Charter on the Welfare of the Child (1990) which Tanzania signed on 23/10/1992 and ratified on 16/3/2003. Article 21 of the said Charter provides:

> ***"Article 21. Protection against Harmful Social and Cultural Practices.***
>
> ***1. State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and***

cultural practices affecting the welfare, dignity, normal growth and development of the Child and in particular:

(a) Those customs and practices prejudicial to the health or life of the child; and

(b) Those customs and practices discriminatory to the child on grounds of sex or other status.

2. 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."

Having taken note of the fact that Tanzania ratified the Charter over 13 years ago, we 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. We have scrutinized closely the case of **Loveness Mudzuru** relied upon by the petitioner, where our Zimbabwean Brothers elaborately looked at different International and Regional Instruments advocating for children's rights vis a vis health risks portrayed by different reports emanating from researches carried out by some institutions. Their Lordships concluded that Zimbabwean provisions which have similar import to the ones impugned had horrific, social and health impacts to children and declare such provisions unconstitutional. We have been persuaded by their observation and we wish to associate ourselves with their conclusion that such provisions should be declared unconstitutional.

On the issue that child marriages impacts on the right to education which eventually, infringes the right to freedom of expression and the right to receipt of information contemplated under the provisions of Article 18 of the Constitution, we agree that there are no material facts placed before us to substantiate the allegation. On the pleaded facts, we have not found any evidence to suggest that lack of education necessarily leads to failure of expression or impediment to the right to receive information. We have taken note of the provisions of section 35(1) of the Education Act as pleaded by the respondent's counsel which provides for compulsory primary education and compels parents to see to it that their children attend school until they finish.

Further to the above, we wish to associate ourselves with the view that levels in education have no direct link with the capacity to self-expression or receipt of information. In that regard, in the absence of clear pleaded facts, we see no concrete evidence to augment the petitioner's argument on the infringement of Article 18 of the Constitution.

With a practical approach, we have looked at the Law of Marriages Act which is undoubtedly old as it was enacted over 45 years ago. We have also taken note of various legislative developments that have taken place since then. We would like to believe that though done in a fragmented way, all was done to match the public outcry worldwide of ensuring that the welfare and protection the girl child is enhanced and the dignity and integrity of women is generally safeguarded. Just to mention a few

such efforts; includes; the promulgation of Sexual Offences Special Provisions (SOSPA) in 1998 which amended the Penal Code and introduced a variety of sexual offences with very hefty punishments. In our considered view if these provisions are properly implemented, the apprehension by the petitioner of abuse of the girl child will be highly diminished.

Close reading of the SOSPA provisions makes us wonder how after its enactment a court could be moved under section 13(2) or 17(2) of the Act and grant leave for a girl under 18 to enter into marriage while such prayer if granted by the court will constitute the newly created offence of statutory rape. From 1998 when the SOSPA amendment came into being, it is now over 15 years now, which means, we do not expect to have valid and competent applications still been filed in our courts seeking leave. Likewise we do not expect to find criminal cases under section 130(2)(e) where the accused person will be afforded a defence of the victim child been his wife. Our reason for this thinking is that pursuant to the enactment of the SOSPA provisions any person seeking leave, if male will be committing the offence of rape and if parent or guardian will be attempting to commit the offence of procuring prohibited sexual intercourse as set out by the amendment. Another legislation that is very assertive on the rights of the child is the Law of the Child Act enacted in 2010. It is thus our stance that with such assertive positive legislative processes, the government passively concedes to the gist of the petitioner's claims in the petition.

With regard to the issue whether the provisions of section 13(2) of the Act are arbitrary, we do not think this will detain us much because as argued by the respondent's counsel, it is beyond comprehension to entertain the idea that magistrates or judges in their normal minds will abuse the discretion vested in them by the law while knowing fully that they are dealing with a matter involving a child's welfare which is ordinarily delicate by nature. We have indeed wondered whether the petitioner's counsel was serious about the accusation because if so we expected her to provide material facts substantiating such serious allegations. We will leave it there for now.

Having approached this petition as we have done herein above, what needs to be answered now is whether the provisions of sections 13 and 17 of the Act have any justification to remain in the law books. Having given serious reflection to the legislative and other developments that have taken place since the enactment of the Law of Marriage Act in 1971 as discussed herein above including the entrenchment of the bill of rights in the Constitution in 1984, it is our considered view and we entertain no flicker of doubt that the two provisions have lost their usefulness. Apart from giving preferential treatment between boys and girls with regards to the eligible age for marriage and other grounds elucidated herein above, we are constrained to agree with the petitioner that the said provisions are no longer serving any useful purpose. In that regard we are in agreement with the petitioner that they deserve to be declared null and void. The respondent's counsel on the other hand has in the alternatively prayed that if we allow the

petition then instead of declaring the provisions unconstitutional, we should proceed along the lines of Articles 30(5) 13(2) of the Constitution and the Basic Rights and Duties Enforcement Act respectively and afford the Government time to correct the alleged infringements. The latter provision provides:

> 13(2) – *When an application alleges that any law made or action taken by the Government or other authority abolishes or abridges the basic rights, freedoms or duties conferred or imposed by section 12 to 29 of the Constitution and the High Court is satisfied that the law or the action concerned to the extent of the contravention is invalid or unconstitutional,* ***then the High Court shall, instead of declaring the law or action to be invalid or unconstitutional, have the power and the discretion in an appropriate case to allow Parliament or other legislative authority, or the Government or other authority concerned, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it, and the law or action impugned shall until the correction is made or the expiry of the limit set by the High Court, whichever be the shorter, be deemed to be valid.***

From the wording of the above provisions, it is clear that this court has powers to give directions for correcting the impugned provisions. Having found as we have found herein above that the impugned provisions have lost their usefulness, we have no option but to find that the two provisions i.e. sections 13 and 17 of the Law

of Marriage Act, Cap 29 RE 2002 are unconstitutional to the extent explained herein above. Consequently, exercising the powers vested in this court by Articles 30(5) and 13(2) of the Constitution and the Basic Rights and Duties Enforcement Act respectively, we direct the Government through the Attorney General within a period of one (1) year from the date of this order to correct the complained anomalies within the provisions of section 13 and 17 of the Law of Marriage Act and in lieu thereof put 18 years as the eligible age for marriage in respect of both boys and girls.

Consequently, this petition is allowed and it succeeds to the extent discussed herein above. Accordingly, having found that this is a case with public interest hence falling within public interest litigation ambit, we make no order as to costs.

We so order.

S.A.LILA

PRINCIPAL JUDGE

8/7/2016

S. S. KIHIO

JUDGE

8/7/2016

A.A. MUNISI

JUDGE

8/7/2016