IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A., And LEVIRA, J.A.)

CIVIL APPEAL NO. 204 OF 2017

THE ATTORNEY GENERAL ..... APPELLANT

VERSUS

REBECA Z. GYUMI..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam-Main Registry)

(Lila, JK, Kihio, J and Munisi, J.)

dated the 8th day of July, 2016
in
Misc. Civil Cause No. 5 of 2016

JUDGMENT OF THE COURT

24th July & 23rd October, 2019

LEVIRA, J.A.:

This is an appeal on Constitutional matter which was initially lodged and entertained by the High Court of Tanzania at Dar es Salaam, Main Registry (Lila J.K as he then was, Kihiyo, J. and Munisi, J.) in Miscellaneous Civil Cause No. 5 of 2016. In her petition before the High Court, the respondent, Rebeca Z. Gyumi challenged the constitutionality of sections 13 and 17 of the Law of Marriage Act, Cap 29 R.E. 2002 (herein referred as "the LMA"). The said sections require consent of parents or court for girls below 18 years before marriage and at the

same time, section 13(1) and (2) of the LMA allows a female person to get married at the age of 15 years and a male person to get married only upon attaining the age of 18 years. Thus, the respondent argued that the said provisions of the LMA offend the provisions of Articles 12, 13 and 18 of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time (the Constitution). She therefore sought the declaration that the said provisions are null and void, must be expunged from the statute and 18 years should remain the minimum marriage age until the Government amends the law.

On the basis of the respondent's petition before the High Court, four controlling issues were taken into account for determination, namely: **One,** whether the provisions of sections 13 and 17 of the LMA contravene the right to equality as provided for under Article 12 of the Constitution. **Two,** whether the provisions of section 13(1) & (2) of the LMA is discriminatory provision thus contravening the right against discrimination as provided for under Article 13(1), (2), (3), (4) and (5) of the Constitution. **Three,** whether the provisions of section 17 of the LMA contravene the right to equality and dignity of a person, and a right to non-discrimination as provided for under Articles 12 and 13 of the

Constitution. **Four,** whether the provisions of section 13(2) of the LMA is too vague and susceptible of being arbitrarily interpreted to deny female children their right to education which is the cornerstone of the freedom of expression as provided for under Article 18 of the Constitution.

The petition was disposed by way of written submissions. Upon close scrutiny of the submissions by both parties the High Court was satisfied that the provisions of sections 13 and 17 of the LMA are discriminatory as they uphold different treatment to persons of similar situations hence offending the principle of equality enunciated by Articles 12(1) and 13(1) of the Constitution. However, the High Court did not declare the said provisions of the LMA null and void; instead, it found them to be unconstitutional.

In exercise of the powers vested in it under Articles 13(2) and 30(5) of the Constitution and the Basic Rights and Duties Enforcement Act (the BRDEA), 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 section 13 and 17 of the LMA and in lieu thereof put 18 years as the

eligible age for marriage in respect of both boys and girls. The appellant, the Attorney General was aggrieved and hence, the current appeal.

In this appeal, the Attorney General appeals against the whole Judgment of the High Court on the following grounds:

1. *That, the High Court erred in law in holding that sections 13 and 17 of the Law of Marriage Act [Cap 29 R.E. 2002] are discriminatory for giving preferential treatment regarding the eligible ages of marriage between girls and boys.*

2. *That, the High Court erred in law in equating the age of the child with the age of marriage.*

3. *That, the court erred in law by holding that customary and Islamic laws do not apply in matters of marriage stated in the Law of Marriage Act [Cap 29 R.E. 2002].*

4. *That the High Court erred in law by 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 sections 13(2) and 17(2) of the Law of Marriage Act [Cap 29 R.E. 2002].*

5. *That, the High Court erred in law by holding that sections 13 and 17 of the Law of Marriage Act [Cap 29 R.E. 2002] have lost their usefulness thus, they deserve to be declared null and void.*

Basing on the above grounds, the appellant prays to this Court to quash the decision of the High Court and declare that sections 13 and 17 of the LMA are constitutional.

At the hearing of this appeal the appellant was represented by Mr. Mark Mulwambo, learned Principal State Attorney who was assisted by Ms. Alesia Mbuya, also learned Principal State Attorney whereas, the respondent enjoyed the services of Mr. Mpale Mpoki, who was also assisted by Messrs Alex Mgongolwa, Fulgence Massawe and Jebra Kambole, all learned advocates.

Before commencement of the hearing of this appeal, Mr. Mpoki raised a preliminary matter in respect of the list of authorities filed by the appellant in Court on 18th July, 2019 and served to the respondent's counsel. According to him, the said list of authorities contained Hansards *(Majadiliano ya Bunge (HANSARD), TAARIFA RASMI (MKUTANO WA PILI), TAREHE 19 Januari-27 Januari, 1971 and Bunge la Tanzania, Majadiliano ya Bunge, Mkutano wa Kumi na Moja, Kikao cha Kumi na Mbili- Tarehe 18 April 2018)* appearing in No. 7 & 8 of the said list which were not tendered during the trial. He thus objected the said documents to be relied upon in this appeal. After some arguments of counsel for

the parties, Mr. Mulwambo conceded to the objection and therefore, the said Hansards excerpts were expunged from the list of authorities to be relied upon by the appellant in this appeal.

Thereafter, Ms. Mbuya commenced to address the Court by adopting the filed written submissions to constitute an integral part of her submission at the hearing. She then argued the grounds of appeal seriatim. In her submissions, Ms. Mbuya stated that sections 13 and 17 of the LMA are not discriminatory. It was her contention that not all laws that treat people in similar situations differently can be said to be discriminatory rather, it is a way of providing affirmative action to vulnerable members of the community and that some people in similar situations do actually require different treatment due to various reasons including biological ones. In cementing on the affirmative action, Ms. Mbuya referred the Court to section 34(2) of the Persons with Disabilities Act, 2010 which requires the Minister to ensure promotions in employment to persons with disabilities.

As to the biological differences, it was contended that girls and boys though being in the same age still can be treated differently because girls undergo early maturity than boys. Therefore, the

impugned provisions were placed to serve and protect both girls and boys who fail to continue with secondary education as they are likely to engage in early sexual activities. According to the appellant, the High Court was wrong to peg both girls and boys on the same footing since they do not always belong in the same category. Regarding the issue of equality, the learned Principal State Attorney submitted that it only requires people who are similarly situated to be treated similarly while those who are different to be treated differently and that is the essence of age of marriage difference envisaged under sections 13(1) and 17(1) of the LMA.

Furthermore, the learned Principal State Attorney submitted that age is not a criterion for discrimination in our Constitution therefore it is justified by the safety valves stated under section 13(2) and 17(2) of the LMA. To drive the point home this Court was invited to consider the decision in **Mbushuu Alias Dominic Mnyaroje and Others v. R** [1995] T.L.R 79. It was thus argued that, the impugned provisions are valid since they allow the court and parents to give leave or consent for children to marry. The learned Principal State Attorney prayed for the first ground of appeal to be allowed.

In regard to the second ground of appeal, the learned Principal State Attorney argued that it was wrong for the High Court to equate the age of the child with the age of marriage. She argued further that despite the enactment of the Law of the Child Act, 2009 (the LCA) the impugned provisions in the LMA have remained intact. According to her, the age of marriage is different from that of the child because the said age is closely related to the age of puberty and it pays due consideration to the biological maturity of human beings. As such, the age of marriage is set to offer protection to adolescent girls who are most likely to engage in sexual activities before 18 years of age hence, bearing children out of wed lock, she added. Ms. Mbuya emphasised that the age of marriage to a girl is 15 years as per Judge Spry's Report of 1969 which in essence suggested the age of marriage. Thus, the decision of the High court was faulted for taking inspiration from the decision of Zimbabwean case in **Loveness Mudzuru & Ruvimbo Tsopoddz v. Minister of Justice Legal and Parliamentary Affairs and Others,** Constitutional Application No. 79 of 2014 (unreported). The learned Principal State Attorney vehemently alluded that unlike our Constitution, the Zimbabwean Constitution has a specific provision setting the age of marriage to be 18 years. It was her observation that such decision is

only persuasive and thus ought not to have been relied upon by the High Court.

In the third ground of appeal, the main appellant's contention is that, the High Court erred in law by holding that customary and Islamic laws do not apply in matters of marriage stated in the LMA. The learned Principal State Attorney's argument was premised on the fact that the High Court ignored the appellant's argument that, the LMA came up as a result of the views collected in the Report of Judge Spry, 1969 and that the legislation is a fusion of Islamic and Customary values. In addition, Ms. Mbuya contended that, the LMA was enacted on the basis of the White Paper No. 1 of 1969 which was published to seek people's opinion on various customs, traditions and religious customs relating to marriage with a view of codifying them. Her stance was that the LMA exists in a parallel system together with customary law and religious laws of marriage. Moreover, she argued that the customary and Islamic laws cannot override the specific law of marriage as the LMA considers both customary and Islamic laws. Strongly, she aired out that judicial pronouncement cannot change customary practices and therefore, it was wrong for the High Court to decide against Judge Spry's Report.

The appellant claimed that the High Court did not pay due regard to her argument that it will be dangerous and may create chaos if courts were to make judicial pronouncements on the constitutionality of customs and customary law as it was held in **Elizabeth Stephen and Another v. AG** [2006] T.L.R 404.

In conclusion, the learned Principal State Attorney, submitted that, the LMA is a self-executing law and as such, other laws such as the Judicature and Application of Laws Act (JALA) cannot and should not override it.

Submitting on ground four of the appeal, the learned Principal State Attorney argued that the High Court erred in embarking on presumptions by 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 sections 13(2) and 17(2) of the LMA. She pointed out that the law has made tremendous steps in protecting the interests of girls below the age of 18 by outlawing sex out of wedlock for them. Ms. Mbuya further highlighted that there has been some developments of the law, for instance the Sexual Offences Special Provision Act (SOSPA) which creates offences like statutory rape but,

she said, the developments did not touch the LMA because the said Act serves the purpose as she referred the case of the **Attorney General v. W. K. Butambala** [1993] TLR 46.

Other laws referred as part of legislative developments by the appellant include section 130 (2) (e) of the Penal Code [Cap 16 RE 2002]; the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016 in which section 22 amends the Education Act [Cap 353] by adding a new section which prohibits marrying or impregnating primary or secondary school pupils. However, the learned Principal State Attorney was mindful of the fact that, the Education Act only offers safeguard to children who are in the formal education systems and does not cover those who are not. Thus, she emphasised that sections 13 and 17 of the LMA are still relevant to those girls and boys who are below 18 years of age and who are not in the formal education system and wish to get married.

In respect of the fifth ground of appeal, the learned Principal State Attorney contended that the High Court erred in holding that sections 13 and 17 of the LMA have lost their usefulness thus they deserve to be declared null and void. She submitted that under Article

30(5) of the Constitution the High Court was supposed to declare the impugned provisions unconstitutional and if need be, instead, the relevant authority was supposed to be afforded time to correct the anomaly. She also cited section 13(2) of the BRDEA in support of her stance. However, the appellant argued that instead of holding that the provisions of the law deserve to be declared null and void, the High Court was bound to find them either unconstitutional or invalid. In support of this position the appellant cited the case of **Julius Ishengoma Francis Ndyanabo v. Attorney General**, [2004] TLR 41 and **The Hon. Attorney General v. Reverend Christopher Mtikila,** Civil Appeal No.45 of 2009 (unreported) where it was said that, the court never nullified the provisions in issue, rather, the court left it to the appropriate authority (Government) to look into the matter.

The respondent through her learned advocates opposed this appeal by addressing the grounds of appeal one after the other. Mr. Mpoki submitted on the first ground of appeal while, Mr. Mgongolwa, and Mr. Massawe submitted on the second and third grounds of appeal respectively, and Mr. Kambole submitted on the fourth and the fifth grounds of appeal. The respondent's reply to the written submissions in

support of the appeal was as well adopted as part of the respondent's submission.

In regard to the first ground of appeal, Mr. Mpoki commenced his submission by making reference to Article 12 (1) of the Constitution which provides that, all human beings are born free and are all equal. He insisted that Article 12(1) of the Constitution should be read together with Article 13(4) which provides that no person shall be discriminated by any person or any authority acting under any law.

Mr. Mpoki went ahead submitting that, the appellant has failed to justify why there is discrimination between boys and girls under the LMA, as far as the eligible age for marriage is concerned; and that, the impugned provisions are saved by Article 30(2) of the Constitution. In support of his argument he cited a number of decisions, including the case of **Kukutia Ole Pumbun and Another v. Attorney General and Another [1993]** TLR 159 at page 166; **Mbushuu Alias Dominic Mnyaroje and Another v. Republic** [1995] TLR 97, at page 112 and **Julius Ishengoma Francis Ndyanabo** (supra) at page 29.

In regard to the appellant's point that age is not a prohibited ground of discrimination in the Constitution, Mr. Mpoki submitted that it

is untenable because the respondent never alleged that sections 13 and 17 of the LMA constituted discrimination based on age and the High Court did not make a finding to that effect.

It was further submitted by Mr. Mpoki that the aim of affirmative action is to elevate people to the same level in the society as you cannot discriminate people by affirmative action. He added that, sections 13 and 17 of the LMA do not assist a girl or a boy below 14 years to solve problems in the society instead, they put them in more problems. While citing the case of **Julius Ishengoma Francis Nyanabo** (supra) which defines discrimination, Mr. Mpoki argued that discrimination should be defined as distinguishing persons who are supposed to be in the same level and category.

Therefore he submitted that, the LMA does not promote affirmative action for girls. If anything, the said law undermines girls' progress by allowing them to marry earlier and even before they complete their secondary school education. So, according to Mr. Mpoki, sections 13 and 17 of the LMA do not serve the purpose of serving children because they condone segregation contrary to Article 13(1) &

(5) of the Constitution which provides that, all persons (including children) are equal before the law.

In respect of biological reasons, it was Mr. Mpoki's submission that, the appellant has made a bare assertion that girls mature earlier than boys without any scientific proof. That even in the absence of evidence to support that girls mature earlier, the biological maturity or development is not in itself indicative of readiness for marriage. The learned advocate reminded us that the Constitution is very specific in seeking to transcend stereotypes about differences and emphasises that, *"all human beings are borne free, and are all equal" and "every person is entitled to recognition and respect for his dignity"* as per Article 12 of the Constitution.

Submitting on the assertion that allowing girls to marry at younger age is a protective measure, the learned counsel contended that, affording children to get married is not protection. It was further observed that, the institution of marriage does not in itself offer any more protection for young girls than boys of the same age and there is nothing in the LMA that suggests that Parliament's intention in enacting

the said law was to protect girls and boys from engaging in sexual activities.

Regarding the appellant's argument that the LMA was enacted so as to harmonise civil, customary and Islamic law and to accommodate the interests of the whole society, Mr. Mpoki submitted that, if the effect of such codification is to discriminate against one group, then the court should step in to rectify the situation and ensure compliance with the Constitution which asserts equality before the law irrespective of gender or sex. The respondent referred this Court to Article 19(2) of the Constitution which insists that protection of the rights in relation to faith and religion shall be in accordance with the provisions prescribed by the laws which are of importance to a democratic society. However, he was also mindful of section 11(4) of JALA which provides:

> *"Notwithstanding the provisions of this Act the rules of customary law and Islamic law shall not apply in regard to any matter provided in the Law of Marriage Act."*

Regarding the assertion that the impugned provisions assure safeguards and protection, Mr. Mpoki submitted that the alleged safeguards provided by sections 13(2) and 17(2) of the LMA are

discriminatory. Expounding on this point, he stated that under section 13(2) the only safeguard provided is for boys and girls who are fourteen years of age to seek the court's permission to get married under special circumstances. In addition, he argued that section 17(2) of the LMA provides for more avenues for girls under the age of eighteen to get married than boys of the same age and therefore, the said provision is discriminatory.

Addressing on the position of international and regional laws in respect of minimum age for a person to marry, the learned advocate for the respondent faulted the observation made by the learned Principal State Attorney by stating that the said instruments recognise the age of marriage to be 18 years for both men and women. Specifically, some of those provisions are, Article 6 of the Protocol to the African Charter on Human, and People's Rights' on the Rights of Women (Maputo Protocol); The 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. The learned advocate stressed that, these regional and international instruments are applicable in Tanzania, as the same have been signed and ratified by the Government. He went ahead

stating that, the spirit of the Convention on the Rights of the Child (CRC), CEDAW and the African Charter on the Rights and Welfare of the Child have been translated into the Law of the Child Act, 2009 (the LCA) in the long title. Lucidly, he insisted that, section 13(1) of the LCA can be construed to prohibit child marriage.

On the strength of the above submissions, Mr. Mpoki argued that the High Court correctly held that sections 13 and 17 of the LMA are discriminatory for giving preferential treatment regarding the eligible ages of marriage between girls and boys and hence, the first ground of appeal should be dismissed.

Mr. Mgongolwa responded to the second ground of appeal by submitting that, this ground of appeal is misconceived because the gist of the matter is based on sex, age and marriage as a subject matter. He also stated that at page 574 of the Record of Appeal the issue before the High Court was about age as prescribed in sections 13 and 17 of the LMA; and therefore, the issue of age could not be ignored as these sections give clear picture that age is a crucial factor in a marriage. He insisted that, the High Court was right to touch on the issue of age. Mr. Mgongolwa submitted further that, section 9 of the LMA defines the

term marriage to mean a *voluntary union,* so in a legal context a union is a contract. Therefore, it was his submission that a child has no capacity to contract and a child does not cease to be a child because he or she enters in the marriage institution.

In addition, Mr. Mgongolwa submitted that section 2 of the LCA defines a child as an infant who has not attained the age of 18 years. He strongly argued that, as of necessity, the High Court was right to equate the age of the child and the age of marriage.

Regarding the Zimbabwean case of **Loveness Mudzuru & Ruvimbo Tsopoddz** (supra), Mr. Mgongolwa submitted that, the court just took inspiration and it did not say that it is bound by that decision and what the court did is a common practice. Mr. Mgongolwa submitted further that, in the case of **The Attorney General v. Rev. Christopher Mtikila** (supra) relied upon by the appellant the issue was whether the Parliament could alter the basic structure or essential features of the Constitution. In the said case the court did not apply the Indian authorities due to the finding that, the basic structure principle was not applicable to the Constitution and thus distinguishable.

While responding to the appellant's argument that the age of marriage is different from the age of the child and that is why the LCA did not seek to amend the LMA, Mr. Mgongolwa strongly submitted that had LMA provided for the definition of a child, the enactment of the LCA could have affected it.

In regard to the case of **Elizabeth Steven and Another** (supra) referred by the appellant, Mr. Mgongolwa submitted that the said case cannot be embraced at the moment because it dealt with criminal issues and it has nothing to do with the matter at hand.

Regarding the third ground of appeal that the High Court erred in holding that customary and Islamic laws do not apply in matters of marriage stated in the LMA, Mr. Massawe strongly disagreed with the appellant's submission that the LMA exists in a parallel system together with customary and religious laws of marriage. He argued that, the LMA is a result of views collected from people based on their customs, traditions and religions values, when codified, it became a law. He submitted further that, the LMA is the main and the only law in Tanzania that coordinates and regulates matters connected to marriage. Therefore, Mr Massawe submitted that, the decision of the High Court in

this ground of appeal was not a position of the court as said by the appellant but, it is the position of the law under section 11(4) of the JALA. According to the learned counsel, the High Court was proper in interpreting section 11(4) of the JALA and a Pandora box can not be opened by saying that the LMA is enacted to cover customary and Islamic laws.

Another observation made by Mr. Massawe was that the appellant failed to appreciate what was before the trial court as he said that, the High Court did not determine the constitutionality of customary law rather it determined the applicability of customary law vis as vis matters provided for within the LMA. The learned counsel clarified that, before the High Court the respondent was challenging the constitutionality of sections 13 and 17 of the LMA, and thus, the case of **Elizabeth Steven and Another** cited by the appellant is inappropriate in this context. It was further contended that the import of section 11(4) of the JALA does not override the Law of Marriage Act but rather, limits the application of culture and religions rules for matters provided for in the LMA.

In addressing the fourth ground of appeal Mr. Kambole commenced his submission by showing the contradictions brought by

the appellant's submission. As such, he submitted that the arguments offered by the appellant are contradictory to the earlier arguments where the appellant submitted that, the impugned provisions acknowledge that sex happens and that it allows children to be born within marriage. Mr. Kambole noted that, in this ground the appellant argued that the impugned provisions seek to protect the interests of girls and boys by outlawing sex out of wedlock. Another contradiction highlighted by Mr. Kambole is that, the appellant argued that statutory rape is sex of a girl below 18 years of age unless she is a wife of a man. According to him, this submission contradicts the appellant's argument that the provisions are protective, since they facilitate rape of girl child under the gist of marriage.

Mr. Kambole also challenged the amendments of the Education Act by the Written Laws (Miscellaneous) Act, No.2 of 2016 relied upon by the appellant. He argued that, the said amendment could easily have the opposite effect of resulting into girls leaving school to marry when they realise that they are pregnant to prevent the persons who impregnated them from being found guilty under that Act. In addition, Mr. Kambole argued that these provisions are superfluous given the fact

that there are Penal Code provisions on sexual offences against girls below 18 years. The learned advocate argued strongly that, the safeguard provided by those provisions is only to the girls who are in formal education system, regardless of their age. Girls who are not in formal education like vocational training institutes and colleges are unprotected while they deserve the same protection under the law because they are also children.

Mr. Kambole went further arguing that, the **Sexual Offences Special Provision Act (SOSPA)** leaves child bride open to rape; as intercourse between a man and a girl which would otherwise be considered as statutory rape and illegal with or without the girl's consent, is legalised to child brides of ages 15 to 18. Therefore, it was his contention that, this law does not protect a girl child from sexual violence by her husband. According to Mr. Kambole, this ground of appeal is also without merit and thus, he prayed for the same to be dismissed as well.

The fifth ground of appeal was challenged by the respondent as it was submitted that, contrary to the appellant's argument, the High Court did not declared the provisions of sections 13 and 17 of the LMA

as null and void. Mr. Kambole submitted that the judgment and the drawn order are very clear that, the High Court ruled out that those provisions are unconstitutional and the Government was given time to correct the complained of anomalies within the provisions of sections 13 and 17 of the LMA in terms of Article 30(5) of the Constitution which states that:

> *"Where in any proceedings it is alleged that any law enacted or any action taken by the Government or any other authority abrogates or bridges any of the basic rights, freedoms and duties set out in Articles 12 and 29 of this Constitution, and the High Court is satisfied that the law or action concerned, to the extent that it conflicts with this Constitution, is void or is inconsistent with this Constitution, then the High Court , if it deems fit, or if the circumstances or public interest so requires, instead of declaring that such law or action is void, shall have power to decide to afford the Government or other authority concerned an opportunity to rectify the defect found in the law or action concerned within such a period and in such manner as the High Court shall determine, and such law or action shall be deemed to be valid until such time the defect is rectified or the period determined by the High Court lapses, whichever is the earlier. "*

With that stance, it was alluded that the law will be deemed to be valid during the period in which Parliament has to correct it. Thus, the statement by the High Court concurring with the Respondent that the impugned sections ***"deserve to be declared null and void"*** is simply the Court's analysis about the validity and constitutionality of the sections, but not the court's holding on the said provisions. Mr. Kambole emphasised that, it was proper for the court to declare those provisions unconstitutional. He submitted firmly that in situations where a girl child cannot vote, enter into a contract and/or consent into sex, it cannot be said that it is proper to subject her into a marriage contract which the High Court said is a complex conjugal matrimonial relation. He prayed for this ground of appeal to be dismissed as well.

In a very brief rejoinder, Mr. Mulwambo mostly reiterated what was submitted in chief by Ms. Mbuya. He urged us to find and declare that there is a purposive meaning in those provisions of the LMA under scrutiny and allow the appeal.

With all respect and without prejudice, we do not intend to reproduce the whole submissions, rather we will make reference of the same here and there while determining the above introduced grounds of

appeal. We have dispassionately considered at length the rival submissions by both parties and the whole record of appeal. We wish, foremost to appreciate the insights availed by counsel for both parties through their submissions. Indeed, their submissions have carried our mind in serving the purpose of determining the appeal.

In respect of the first ground of appeal, Ms. Mbuya faulted the observation made by the High Court in the premise that, sections 13 and 17 of LMA are not discriminatory because they tend to treat people in similar situations differently as a way of providing affirmative action to vulnerable members of the community. She cued examples under section 34(2) of Persons with Disabilities Act, 2010 and section 33(1) of the Employment and Labour Relations Act, 2004 as provisions of the law which ensure realisation in protection of vulnerable members of the community.

To appreciate the import of sections 13 and 17 of LMA, as the High Court did we find it prudent to reproduce them in full as follows:

> ***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.

Also section 17 provides;

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 no require consent.

(2) Where the court is satisfied that the consent of any person to a proposed marriage is being withheld unreasonably or that it is impracticable to

obtain such consent, the court may, on application, give consent and such consent shall have the same effect as if it had been given by the person whose consent is required by subsection (1).
[The emphasis is supplied]

In light of the above provisions, the law has set a minimum age to a person who wants to marry. That is, a woman and a man are eligible to marry when they attain the age of 15 and 18 years respectively. Apart from setting the minimum age, there is a preceding condition on a woman opting to marry at the age of fifteen. She can acquire such right after obtaining consent from her father, mother, guardian or leave of the court.

It is not in dispute that, a woman at the age of 15 years is a child as per section 4(1) of the LCA. Also with the spirit embraced under sections 13 and 17 of LMA, it is apparent that a man has been exalted as one having overriding treatment against the woman. It is only a woman "technically a child" who can marry while she is below the age of eighteen years with the consent of her parents or a court. Does that sound as discrimination? Or is it an affirmative action?

We are mindful of the fact that LMA was enacted in 1971 and that the impugned provisions were incorporated to serve the purpose at such particular era and perhaps to date. However, it is our respectful view that, Tanzania is not an isolated island. It has from time to time been indebted to legal jurisprudence from other jurisdictions by ratifying and domesticating international, regional and sub regional instruments or enacting laws as a means of acknowledging the outcry of the international community and taking action against the violation of human rights which includes the right of a girl child. By ratifying and domesticating these instruments, the Government of Tanzania has demonstrated commitment to enforce them and assure smooth realization of human and peoples' rights. Thus, the impugned provisions can not be interpreted in isolation rather in comparison to the said instruments which have laid profounding principles on rights to marry and finding a family. It is through them, we can possibly ascertain as to whether sections 13 and 17 of LMA are discriminatory or not.

Before we proceed further, we have taken deliberate effort to revisit some of the provisions envisaged in selected instruments under which Tanzania is a member. Under **Article 16** of Universal Declaration of Human Rights, 1948 it is provided that:

(1) ***Men and women of full age,*** *without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*

(2) Marriage shall be entered into only with ***the free and full consent*** *of the intending spouses.*

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. [Emphasis added]

Article 1 of the Convention on the Rights of the Child, 1989 and **Article 2** of the African Charter on the Rights and Welfare of the Child, 1990 define a child to mean every human being below the age of 18 years, unless under the law applicable to the child, majority is attained earlier.

Under **Article 6** of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 States Parties are obliged to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They are also required to enact appropriate national legislation to guarantee that:

a) No marriage shall take place without the free and full consent of both parties;

b) The minimum age of marriage for women shall be 18 years. [Emphasis added]

Much as it can be gleaned from the above provisions, there are two underscored preceding requirements which must be taken on board to realize the right to marry. It is clearly proclaimed that only men and women of full age have the right to marry. By necessary implication a person who has not attained the age of 18 years and above lacks the capacity to enjoy the right to marry. Apart from age requirement, it is further reckoned that the persons who enter into marriage must pass the test of free and full consent.

Turning to the issue under discussion, it is apparent that the impugned provisions of the LMA on one hand allow men with full age to marry; it does the same to the women, but with relaxed and compromised conditions that they are capable to marry even when they are below the age of majority (18 years). The learned advocates for the respondent were adamant that the law does not promote affirmative action instead it undermines the girls' progress. With greatest respect we subscribe to this proposition in the sense that, the law does not

subject the women to any constructive outcome. We tend to hold so for the reasons we shall soon demonstrate.

Firstly, the impugned provisions have failed to uphold and appreciate the true intentions of the respective international, regional and sub regional instruments. The bottom line of all the Conventions on the rights of a child is that no marriage can be contracted with person or persons who have not attained the age of majority. This principle is envisaged under the Law of the Child Act, 2009 (the LCA). Thus, the existence of sections 13 and 17 of LMA do not only violate the international law with which Tanzania is a member and has signed and ratified, but also it offends the salutary principles of law of contract which call for competency of the parties who enter into the contract, particularly, in a marriage as a contract. We need to note that, the Convention on the Rights of the Child, 1989 (the CRC) came after the enactment of the LMA, 1971. In 2009 Tanzania enacted the Law of the Child Act to reflect the rights protected by the CRC without amending the impugned provisions of the LMA to reflect the age and rights protected in the LCA. In our respective views, we think that, amendment of the said provisions was necessary. Thus, with the legislative

development under the LCA, the amendment of the Education Act, Cap 353 vide the Written Law (Miscellaneous Amendment) Act and the amendment of the Penal Code through the Sexual Offence Special Provisions Act (SOSPA), which are geared at protecting rights of children, in our considered opinion, we do not think that the development in the above laws are to be treated in isolation with the LMA when it comes to matters touching on the rights of children and in particular rights against discrimination.

Secondly, with all due respect to the learned Principal State Attorneys for the appellant, the assertions that different treatment of the same persons promotes affirmative action, we think, is far demanding of merit. There is no scientific proof which substantiate the narration that, due to biological reasons, girls should be subjected to early marriages. We subscribe to the findings of the High Court that, the operation of sections 13 and 17 of LMA expose girls to serious matrimonial obligations and health risks like domestic and gender based violence, psychological distress, miscarriage and teenage pregnancies. As rightly found by the High Court it is our settled view, that marriage of a child

under 18 years subjects a child into complex matrimonial and conjugal obligations.

Thirdly, we agree with the learned counsel for the respondent who hinted that the dictates of section 34(2) of Persons with Disabilities Act, 2010 and section 33(1) of the Employment and Labour Relations Act, 2004 are serving distinguishable purposes. We are equally of the view that at any stretch of imagination, the said provisions cannot be equated with impugned provisions in the LMA. We hold so because in other laws, the minorities enjoy the preferential treatment which is a positive or rather affirmative discrimination as it aims at facilitating employment opportunities and requisite protection to the disadvantaged. We consider that, since the LCA does not define a child by distinguishing between a boy and a girl child and /or give preferential treatment to a girl child, it is high time that, a child should also be so recognized under the impugned provisions of the LMA to ensure equal treatment and non-discrimination between boys and girls.

In the event, we are now satisfied that the impugned provisions under LMA do not give equal treatment between a boy and girl child thus contravene Articles 12 and 13 of the Constitution. We take note

that the appellant did not discuss whether or not the impugned provisions of the LMA are saved under Article 30(1) of the Constitution. However, it is our observation that the said provisions curtail the rights and freedoms of a girl child intended to be protected by Article 30(1) of the Constitution. Therefore, we do not see any cogent reason to disturb the findings of the High Court. Having so stated, the first ground of appeal fails.

In the second ground of appeal the appellant argued that it was wrong for the High Court to equate the age of the child with the age of marriage. Basically, this ground of appeal is challenging part of the impugned judgment as reflected at page 576 of the Record of Appeal when the High Court stated:

> *"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* ***(section 13(1) & (2) i.e. girls at 15 years or even 14 years) while for boys it is 18 years or 14 years;*** *it is thus true that the provisions give* ***differential treatment between girls and boys*** *as far as the eligible age of marriage is concerned."* [Emphasis added]

The appellant disagrees with the above holding of the High Court on account that the age of marriage and of the child is different because they tend to achieve different objectives. It was further contended that the age of marriage has a very close relation to the age of puberty and it is set to protect teenagers who are mostly likely to engage in sexual activities before they attain the age of 18 years.

It is our firm observation that the appellant's assertions are not, with respect, sound reasons. We are mindful that Marriage relationship stands as a social contract therefore the age of child and age of marriage are inseparable factors to be taken into account. As we have stated earlier, girls cannot be protected from sexual activities by allowing them to get married at younger age as correctly argued by the respondent. When we were expounding the first issue, it was clearly stated that sections 13 and 17 give different treatment between a boy and a girl child. The basis of that holding was in consequential to the age of child against the age of marriage. 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. As such, in our considered views, a girl

child does not acquire adult status and/ or capacity to contract because of marriage. The international legal instruments which Tanzania has ratified and domesticated, expressly provide that men and women should be equal partners in marriage; neither of them should be treated as having overriding right than the other when entering the union.

In that sense therefore, we agree with the High Court that the impugned provisions provide for unequal treatment between girls and boys. We wish to add that, a child is a child whether married or not. So, age has to be considered first before one enters in a marriage contract otherwise there was no need even for the LMA to set age and conditions for one to marry. It is our firm view that, the High Court correctly equated the age of the child and the age of marriage. We thus agree with the submission of the counsel for the respondent that, the second ground of appeal is without merit.

We now revert to the third ground as we consider whether customary and Islamic law apply in matters of marriage stated in the LMA. Ms. Mbuya stated that it was wrong for the High Court to hold that customary and Islamic laws do not apply in matters of marriage stated in the LMA. According to her, since the LMA was enacted as a result of

views collected in the Report of Judge Spry, 1969 and the said legislation is a fusion of Islamic and customary values therefore, the LMA exists in parallel system together with customary and religious laws of marriage. While referring to the case of **Elizabeth Stephan and Another** (supra), the appellant was of the view that, if courts were to make judicial pronouncements on the constitutionality of customary and Islamic laws, it will be dangerous and may create chaos.

The respondent on the other hand disagreed with the appellant's assertion in regard to customary and religious laws of marriage. According to the respondent, since the LMA is a result of views collected from people basing on their customs, traditions and religious values, once codified, it becomes a law and therefore, customs and religious sentiments have no place for the codified matters. Mr. Massawe commended the High Court for giving proper interpretation of section 11(4) of the JALA while dealing with matters raised in this ground of appeal. He urged us to consider that, the issue before the High Court was a 'child' in relation to LMA. Thus, he said, it was proper for the High Court to scrutinise the constitutionality of sections 13 and 17 of the LMA just like it is the case to other laws whose constitutionality is challenged.

We think it is instructive to consider what exactly transpired in the holding of the High Court hereunder:

> *"Having closely gone through the provisions of section 11 of the Judicature and Application of Laws Act, Cap 358 R.E. 2002* ***we are satisfied that it prohibits the application of customary law and rules of Islamic Law in the Law of Marriage Act.*** *That being 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 in the Law of Marriage Act."*

Then the High Court went ahead stating that:

> *"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."*

It appears that the appellant is faulting the plain interpretation given by the High Court in respect of section 11(4) of the JALA. We are

mindful of the guidance under the principle of the law that, whenever the language of the statute is plain and clear, the duty of interpretation does not arise and therefore the provisions of law applied do not invite discussion. This stance can also be observed in the decision of the Court in **Republic v. Mwesige Geofrey and Tito Bushahu,** Criminal Appeal No. 355 of 2014 (unreported). While dealing with similar issue of statutory interpretation, the Court quoted with approval the decision of the USA Supreme Court in **Caminetti v. USA** 242 US, 270 (1919); and, **Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al.** 227 U.S 102(1980). In **Caminetti's** case (supra) it was stated that:

> *"It is elementary that meaning of a statute must in the first instance, be sought in the language in which the statute is framed, if it is plain ... the sole function of the courts is to enforce it according to its terms".*

The Court was persuaded by that decision and went on expounding that:

> *"We have chosen to begin our discussion with the familiar canon of. statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absenting a clearly*

expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."

Being guided by the above principle, we are of the considered view that the interpretation of section 11(4) of JALA by the High Court was in line with the above elaborated principle. This is due to the fact that, the language of the statute is plain and therefore, the above provision needed to be interpreted ordinarily by looking at what the legislator intended to say and that is what it means.

It can be captured from the LMA's long title that, this law was not made to coordinate the operation of customary and Islamic laws rather it was introduced to regulate the law relating to marriage, personal and property rights between husband and wife, separation, divorce and other matrimonial reliefs and other related matters. We safely discern this to be the intention of Parliament underlying the enactment of the LMA. For clarity the long title of the LMA is quoted hereunder:

"An Act to regulate the law relating to marriage, personal and property rights as between husband and wife, separation, divorce and other matrimonial reliefs and other related matters."

Thus, the assertion that LMA is not a self executing law because it was enacted as a result of views collected from people basing on their customs, traditions and religious values, does not carry any weight, it is unfounded and it offends the spirit of section 11(4) of JALA.

While referring to the case of **Elizabeth Stephan and Another** (supra), the learned Principal State Attorney argued that it will be dangerous and may create chaos if courts were to make judicial pronouncements on the constitutionality of customary and Islamic laws. This line of argument was challenged by the respondent on the ground that it was made out of context. Indeed, the raised argument is devoid of merit because our thorough perusal of the record does not indicate that the High Court dealt with the constitutionality of either the customary or Islamic laws. We therefore agree with the counsel for the respondent that, the case cited by the appellant is distinguishable from the case under discussion. In that case the petitioners filed their petition under the provisions of Article 30(3) of the Constitution and sections 4, 5 and 6 of the BRDEA. They prayed for the Court to declare unconstitutional some of the paragraphs of the Second schedule to the Local Customary Law (Declaration) (No.4) Order, 1963, G.N. 436 of

1963 for violating their basic rights as guaranteed under Articles 12(1) and (2),13 (1), (2) (4) and (5) and 24 (1) of the Constitution. Upon close scrutiny the Court formed an opinion that:

> *"For customs and customary law, it would be dangerous and may create chaos if courts were to make judicial pronouncements on their Constitutionality. This will be opening the pandora's box, with all seemingly discriminative customs from our 120 tribes plus following the same path."*

In the circumstances, the position transcended in the case of **Elizabeth Stephan and Another** (supra), is distinguishable from the present matter in two dimensions. Firstly, the petitioners who were Wasukuma by tribe sought for declaration that some paragraphs of the Second Schedule to the Local Customary Law (Declaration) (No.4) Order, 1963, G.N. 436 of 1963 are unconstitutional. Therefore, their petition was rooted on customary and traditional values which existed within the community of Wasukuma. Secondly, any judicial pronouncement declaring the said paragraph to be unconstitutional could lead to chaos because their amendment avenue was not through the courts of law rather the district council where the parties reside. At any stretch of imagination we can not equate the circumstances of that

case with the present matter as in this appeal, the contention is not based on only a specific ethnic group or tribe. In this case therefore, the High Court was right to base its decision on the provisions of section 11(4) of JALA.

Regarding the argument by the appellant that the LMA exists in parallel system together with customary and religious laws of marriage, we need to pause and consider this statement particularly, by considering what it means by parallel system. The **Concise Oxford English Dictionary, Eleventh Edition** defines the term parallel to mean "occurring or existing at the same time or in a similar way". By this definition, it is our respective observation that the two are dispensable and they cannot co-exist in a parallel system. As we stated earlier on, all matters to which the law applicable is LMA, the rules of customs and religious values are inoperative. In this regard we subscribe to the decision in **Mohamed Ndatwa v. Hamisi Omari** [1988] TLR 137 where Samatta, J. (as he then was) while dealing with interpretation of section 71 of the LMA as the appellant therein had filed a suit claiming from the respondent recovery of dowry and various

tradition payments he made when he married the respondent's daughter, had this to say:

> *"Any rules of Customary Law or Islamic Law which might have regulated the return of gifts made in contemplation of a marriage are now suspended by the provisions of section 71 of the Act, quoted above. The provisions of section 3A of the Judicature and Application of Laws Ordinance, Cap. 453, make that perfectly clear. The section reads: 3A 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, 1971. The various payments made by the appellant in contemplation of the marriage to the respondent's daughter were in effect, whatever name one attaches to them, gifts, and, therefore, are covered by the provisions of s. 71 of the Act. It follows that, in my considered opinion, in law the appellant is not entitled to the restitution of the said gifts."*

Thus, in our considered view, the contention that LMA exists in parallel system together with customary and religious laws of marriage is tantamount to interpolations of what is not stated in the law. We need to emphasise here that, the law is supposed to be given proper

interpretation. Basing on our discussion above, we find the third ground of appeal unmerited.

In the fourth ground of appeal the appellant is complaining that the High Court erred by basing its decision on speculations on the future validity and competency of 'applications' intended to be made under sections 13(2) and 17(2) of the LMA. The appellant vigorously argued that the holding of the High Court was based on speculation while the law is still in existence aiming at safeguarding the interests of boys and girls. The appellant's argument was highly challenged by the respondent where, Mr. Kambole stated that, the issue before the High Court was not on the applications for leave under the scrutinised provisions as the appellant would wish it to sound. But, he said, it was just an *obita dictum* - whether there will be valid application to seek leave and that was not the basis of the impugned decision. To be certain on this matter, it is pertinent to revisit what the High Court said as reflected at page 583 of the Record of Appeal:

> *"Close reading of 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*** *(sic),* ***which means we do not expect to have valid and competent applications still been filed in our courts seeking leave."*** [Emphasis added]

As it can be deduced from the above extract, the High Court aired out its views after having traced and recognised the legislative developments which aim at ensuring welfare and protection of a child. In that regard, we do not agree with the appellant that what was stated was the holding of the High Court. The words used by the High Court are very clear as the above extract gives a clear picture that, the appellant missed a proper interpretation of what was said by the High Court. It is important to note that, there is a difference between 'holding' of the court and '*orbita dictum*', although these terminologies are interrelated, as *obita dictum* may assist in reaching into the holding but they are not one and the same thing. The ***Black's Law Dictionary Free Online Legal Dictionary 2nd Edition*** defines the term "hold" to mean: *"To adjudge or decide, spoken of the court particularly to declare the conclusion of law*

reached by the court as to the legal effect of the facts discussed." On the other hand, it also defines the term '*orbiter dictum*' to mean: *"Said in passing, it is a judge's statement that is based on some established facts, but does not affect the judgment."*

Basing on the above definitions, we are satisfied with the respondent's argument that, indeed, what was stated by the High Court was an *orbiter dictum* as its decision did not determine the fate or future of the validity and competency of the intended applications under the said provisions subject to this appeal. In our considered view, the statement by the High Court was not aiming at underrating the Government's efforts in ensuring welfare and protection of a child. To support our view let the relevant part of the impugned decision speak for itself:

> *"With a practical approach, we have looked at the Law of Marriage 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 of the girl child is enhancing and the dignity and integrity is generally safeguarded."

Having clearly demonstrated what was said by the High Court after appreciating the legislative developments that have been taking place, we do not find any reason as to why we should differ with the observation made in regard to the 'applications' referred therein. It is undisputed fact that the LMA and in particular impugned provisions came into existence before various legislative developments referred by the High Court and others. Before the enactment of the LCA Tanzania had no specific law to lay a clear demarcation between a child and an adult so as to safeguard the rights and interests of the child. Therefore, we should not be surprised, though ionically that the said provisions of LMA protect the rights of a child by requiring applications to be made before marriage as a way of safeguarding child rights and interests. We note that the said rights and interests are now safeguarded under a specific law which in our considered opinion need to be reflected in old laws through amendments. With that observation in our minds, we find that, there is no way it can be said with certainty that the High Court made its holding basing on a speculation in regard to applications under sections 13(2) and 17(2) of the LMA, as in the first place, there was no

such holding in that regard. Therefore, this ground of appeal in our considered observation is non-meritorious.

The fifth and last ground of appeal need not detain us much. As correctly submitted by the respondent, the trial court did not err in holding that sections 13 and 17 of the LMA have lost their usefulness thus they deserve to be declared null and void as contended by the appellant. At the outset, it has to be clear that we have failed to understand the gist of what is challenged in the fifth ground of appeal. We wish to reproduce the relevant part of the impugned decision hereunder:

> *".... Apart from giving preferential treatment between boys and girls in 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."*** [Emphasis added]

The High Court having considered all the arguments for and against the petition found that sections 13 and 17 of the LMA are unconstitutional and that was the conclusion reached by the High Court

as correctly pointed out by the respondent. It should be noted that, the said provisions of the LMA were not declared null and void by the High Court as the appellant would wish us to consider. That is why having found the said provisions unconstitutional, the High Court gave the Government a period of one year to cause the amendment of the LMA. In the circumstances, we find and hold that the fifth ground of appeal is also unmerited.

For the foregoing, we find and hold that the entire appeal has no merit. The appellant was supposed to abide by the order of the High Court to cause the amendment of the LMA as directed. Having so stated, we dismiss the appeal in its entirety with no order as to costs.

DATED at **DAR ES SALAAM** this 15th day of October, 2019.

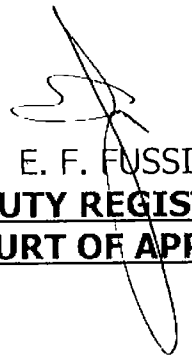
A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered this 23rd day of October in the presence of Ms. Alesia Mbuya, learned Principal State Attorney assisted by Mr. Stanley Kalokola and Ms. Nalinda Sekimanga, learned State attorneys for the

Applicant and Mr. Alex Mgongorwa, Ms. Mary Richard and Mr. Jebra Kambole, learned advocates for the respondent in person is hereby certify as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL