Chapter 6

Child Early and Forced Marriage

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Forced marriage: "The marriage of individuals against their will (includes 'early marriage')."

Kenya 

Council of Imams and Preachers of Kenya, Malindi & 4 others v The Attorney General & 5 others [2015] HC

Principle or Rule Established by the Court's Decision

Marriages of persons under the age of 18 years, though permissible under Islamic practice, are impermissible under constitutional provisions, which limit the right to marry to adults (i.e. persons over 18 years of age) and which protect the best interests of a child.

Judge: Said J. Chitembwe | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Preliminary objection allowed; marriage of child not permitted under Constitution of Kenya 2010	High Court, Malindi (Kenya)	Constitutional Petition No. 40 of 201; judgement delivered on 29 October 2015	Child marriage

Case Summary

The third and fourth petitioners were charged with the offence of subjecting a girl aged 16 to harmful cultural rites, contrary to Section 14 as read with Section 20 of the Children Act, when they arranged for her early marriage. The girl (second petitioner) was at the material time a child professing adherence to the Islamic faith and was married off in accordance with Islamic law.

The petitioners filed a petition seeking declarations that the arrest, arraignment and charge of some of the petitioners was unconstitutional, wrong and illegal and that the statutory provisions ordinarily prohibiting child marriage do not apply to marriages conducted under Islamic law. The ultimate issue for determination was whether a child aged 17 years old

professing Islamic faith could enter into a marriage contract under Islamic Law and whether the said marriage was lawful under Kenyan laws.

Judge Chitembwe held that marriages of persons under the age of 18, although permissible under Islamic practice, are not permitted in Kenya. Child marriage cannot be allowed in the name of expressing religious freedom.

Article 24(4) of the Constitution provides that:

> *The provisions on the Bill of Rights on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.*

Nevertheless, the right to Islamic marriage is not an absolute, non-derogable right under Article 25.

Article 45(4) of the Constitution provides that the state recognise marriages concluded under any *"tradition, system of religious, personal or family law"* only to the extent that they are consistent with the provisions of the Constitution.

While the Constitution should be interpreted to give effect to Islamic law, constitutional provisions must be interpreted in light of other articles. Article 53(1)(d) provides that:

> *Every child has the right—(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour."*

The judge stated that Article 53(1)(d) of the Constitution ought to be interpreted broadly in a manner that does not derogate from its core essence or bring an absurdity or embarrass the Constitution. Further, "harmful cultural practice" should be broadly interpreted to include religious practices that are not in line with the Constitution. The interpretation of the Bill of Rights is also guided by Article 20(4):

> *In interpreting the Bill of Rights, a court, tribunal or other authority shall promote – (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.*

The Constitution imposes a fundamental duty on the state and every state organ to, *"observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights"* (Article 21(1)) and to, *"address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities"* (Article 21(3)).

The state has a constitutional duty to protect a child from child marriage, as this practice is not in the best interest of the child, regardless of the child's creed, sex, intellectual capacity or socio-economic background. Although the Constitution grants the freedom to exercise one's religion, that freedom has to be carried out in line with the other constitutional provisions. At Paragraph 24, the judge stated:

> *If each religion is given a freehand to exercise its belief without a common ground, then the end result will be disharmony in the Kenyan society.*

Article 45(2) of the Constitution provides for the right to marry to adults – that is, persons who are at least 18 years old. Therefore, the Constitution does not permit the purported marriage of a child. A child lacks capacity to enter into a marriage contract.

Further, "early marriage" is also prohibited under Section 14 of the Children Act. The judge found that the petitioners, in allowing or orchestrating the marriage, had perpetrated a crime, and that any purported attempt to consummate the marriage would amount to the offence of defilement. The Court therefore ordered that the respondents face the charges alleged against them before the trial magistrate.

Points to Note

- This case sent a clear message that child marriage is unconstitutional and cannot be condoned or overlooked.
- The Children Act and the Constitution outlaw child marriage. A child is any human being below 18 years. A child cannot consent to marriage or sex.
- This decision should give courage to prosecutors to prosecute child marriage cases in the best interest of the child.
- This is an important precedent as it extends the duty not only to prosecuting those found to have breached the duty of care but also to ensuring the protection and well-being of child victims. The respondents in this case were faulted for failing to provide appropriate psychological support for child victims who were subjected to sexual violence by their teachers.

Obiter Dictum

The judge stated that the Article 32 right to freedom, conscience, religion, thought, belief and opinion should be read in light of every child's right to free and basic compulsory basic education under Article 53(1)(b). However, as stated by the judge, this was not the reason/ratio for finding that Islamic child marriage violates the Constitution, but merely demonstrates the importance of interpreting constitutional provisions against other provisions.

Rwanda 

Prosecution v Nshimiyimana [2016] HC

Principle or Rule Established by the Court's Decision

While determining the age of a child, a birth certificate has more probative value than the mere statements of the parent.

Justice: Bukuba Umulisa Claire | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Supreme Court (Rwanda)	Case No. RPA 00332/2016/ HC/KIG of 30 June 2016	Child marriage

Case Summary

The accused was charged with living with a minor as his wife, contrary to the Penal Code. It was alleged that the offence took place in 2015. He was convicted and sentenced to 10 years' imprisonment by The Intermediate Court.

The accused appealed to the High Court. He contended that he had been wrongfully convicted because there was doubt about whether the girl was a minor at the time of the offence in 2015. The girls' birth certificate suggested she was born in 2000. However, the mother of the victim gave a written statement wherein she declared that her daughter was born in 1996. If the statement was accepted as correct, it meant she had attained the age of majority by the time of the offence.

The High Court ruled that the statement of her mother indicating that her daughter was born in 1996 had no value and could not contradict the birth certificate. The birth certificate indicated that the girl was a minor at the time of the offence in 2015. Therefore, the High Court found the accused guilty of the offence of living together with a child as his wife.

The High Court also confirmed the sentence of 10 years' imprisonment. This was the minimum sentence provided for by the law for that offence.

Points to Note

- The case is notable as to the weight to be given to contradicting pieces of evidence provided to the court on the age of a child. When one of the pieces of evidence is a birth certificate, this prevails.

- The accused cannot seek the benefit of doubt because the birth certificate resolves the issue of doubt.
- Cohabitation with a child below the age of 18 implies the offence of living with a child as a husband or wife is committed.
- There could be no more of a reduction of penalty by the appellate court. Life imprisonment with special provisions had been converted into a minimum fixed-term imprisonment of 10 years in light of the mitigating circumstances.

Tanzania 

Republic v Modest & another [1968]

Principle or Rule Established by the Court's Decision

The normal understanding of the word "woman" is limited to an adult human female. Unless there is a clear indication to the contrary, legislative provisions referring to a "woman" will be taken as bearing this meaning.

Judge: Seaton | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction quashed and sentence set aside	High Court, Mwanza (Tanzania)	Criminal Revision No. 26 of 1968 delivered 1969	Child marriage

Case Summary

The complainant was a schoolgirl aged between 10 and 12. The complainant's father appeared to be mentally disturbed and therefore she was under the guardianship of the first accused, her brother. She was forced by her brother to marry the second accused because the second accused had already paid a sum by way of bride wealth to marry the complainant's sister. However, the sister married another man. The marriage ceremony was performed and the complainant was taken to the second accused's home where she stayed for four days. The second accused did not have sexual relations with her.

The complainant did not return to school, and her headmaster complained to the village executive officer. Consequently, the accused were arrested and charged with abduction, contrary to Section 133 of the Penal Code. They were convicted as charged and sentenced to five and 2 days' imprisonment, respectively.

The High Court called for the court record because the sentence passed seemed unreasonably light. The High Court found that the offence charged had not in fact been committed. The conviction was therefore quashed and the sentence was set aside.

Section 134 of the Penal Code provides that:

> *Any person who unlawfully takes an unmarried girl under the age of sixteen years out of the custody or protection of her father or mother or other person having the lawful care or charge of her, and against the will of such father or mother or other person, is guilty of a misdemeanour.*

This offence was of clear application to a girl under 16 years of age. However, it did not appear to have been committed because the father of the complainant and the guardian had consented to the victim being taken away. For this reason, a charged under Section 133 had been preferred.

Section 133 provides that:

> *Any person who with intent to marry or have sexual intercourse with a woman of any age, or to cause her to be married or to have sexual intercourse with any other person, takes her away, or detains her, against her will commits an offence.*

Although there is no express reference to age, Section 133 requires the complainant to be aged 16 or over because it refers to "her will". A girl under the age of 16 would be under the custody or the charge of the senior relative and would be too immature to give their own consent.

The accused was thus improperly charged under Section 133 because the complainant was under the age of 16.

Points to Note

- This is a decision related to forced marriage, which emanated from abduction and then marriage. The case also involved removing a young girl from school. It is an important case because it creates a link between offences of abduction and forced marriage. It shows that such incidents occur in our society and the fact that courts are there to protect those who are victimised in such a way.
- However, to do so, a charge must be brought correctly. The decision gave an interpretation of the word "woman" in the offence of abduction and therefore stressed the importance of laying appropriate charges for offences committed.
- From the Court findings, it is clear that the second accused could have been charged for contravening Section 138 if evidence had

been adduced that he molested the complainant during those four days they had spent together. Section 138 provides that:

> *Any person who being married to a woman under the age of 15 years, has or attempted to have sexual intercourse with her, whether with or without her consent, before she has attained the age of 15 years commits an offence.*

Bashford v Tuli [1971] HC

Principle or Rule Established by the Court's Decision

A marriage under Islamic Law is a civil contract. The marriage contract may be declared null and void if it is entered into because of a misrepresentation.

Judge: Hamyln | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Marriage declared null and void	High Court/Original (Tanzania)	(1971) HCD 76; delivered on 22 February 1971	Child marriage

Case Summary

The petitioner applied for a declaration that the marriage ceremony performed between her and the respondent in 1968 was null and void. The ceremony took place in Ontario, Canada, under Islamic law before a local imam.

The petitioner alleged that, at the time of the ceremony, she was under a misconception that the respondent was unmarried. It was part of the bargain of her marrying the respondent that he was not to marry others. When the parties went to the respondent's house in Tanzania, the respondent introduced the petitioner to two women as his other wives, whom he had married before marrying her. The petitioner left the respondent immediately.

The Court's main issue for consideration was to determine whether there was deliberate misrepresentation on the part of the respondent regarding his marital status at the time of the marriage ceremony and whether the misrepresentation was of a condition precedent to the agreement to marry on the part of the petitioner to render the marriage void *ab initio*.

The Court found that:

> *The marriage under Mohamedan law is a civil contract and is like a contract of sale. Sale is the transfer of property for a price. In the contract of marriage, the wife is the property, and the dower the price". While this is not flattering to the woman, such contract is subject to normal*

> *considerations which govern such agreements. "There is ample evidence on the record (which is not in issue) that the petitioner would never have entered into the marriage contract with the respondent had she been aware of his marital status.*

The Court therefore found that:

> *The woman, in consenting to the marriage ceremony, gave such consent on a completely erroneous conception to the marriage ceremony and nor was such an error a mere misconception which the petitioner could have, or should have, avoided, for it arose from a deliberate misrepresentation on the part of the respondent.*

Points to Note

- In Islamic Law, there should not be misrepresentation of facts that could induce one party to consent to a marriage.
- Consent to marriage should emanate from knowledge of all facts, especially knowledge of conditions precedent that lead one to consent to the marriage.
- The decision supports the protection of women in contracting marriages.

Other cases/decisions referred to
Country/cases
India | *Suburannessa v Sabdu Sheikh & others* [1934] AIR, Calcutta
Abdul Latif Khan & another v Niyaz Ahmed Khan [1909] 31 IL Allahad 343
Bibi Ahmedoun-Niza Begau v Aki Akbar Shah [1942] AIR Peshawar 19

Chalimba Chimbalemba v Republic [2011] CA

Principle or Rule Established by the Court's Decision

A victim who is a minor of 15 years of age and not a wife of the perpetrator has no capacity in law to consent to having carnal knowledge.

Judges: Munuo, Massati & Mandia | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal/ Appellate (Tanzania)	Criminal Appeal No. 368 of 2008; delivered 9 November 2011	Early marriage

Case Summary

The appellant had been found guilty of rape, contrary to Sections 130(1)(e) and 131(1) of the Penal Code. The victim was a 15-year-old primary school student. While going home, the victim met the appellant, who lured her to go to his relative's home, where they cohabited for a number of days. During this time, the appellant and the victim had sexual intercourse. The appellant contended that he wanted to marry the girl, and she consented both to the marriage and to sexual intercourse. However, the father of the victim did not want the marriage to take place, resulting in the charges being instigated.

The High Court upheld the conviction. The appellant challenged the decision of the High Court at the Court of Appeal.

The Court of Appeal dismissed the appellant's contentions. In any event, whether there was an *intention* to marry was irrelevant. The law provided that a 15 year old could consent to sexual intercourse only if she *was* lawfully married.

Points to Note

- This case is one of a very few cases decided by the Court of Appeal, discussing the age of capacity to consent to sexual intercourse and what amounts to statutory rape, addressing whether a 15 year old can consent to sexual intercourse and interpreting the relevant laws, especially Sections 130(2)(e) and 131(1) of the Penal Code.
- It is a case that highlighted the contradictions in the legislation. The Penal Code and the Marriage Act generally provide that a child is a person below 18 years of age and does not permit them in most circumstances to consent either to marriage or to sexual intercourse. This reflects the Law of the Child Act, which states that the age of a child is below 18. Despite young persons below the age of 18 legally being children, they are permitted to marry with the leave of the court at 14 or 15 with the consent of a parent, and may consent to sexual intercourse at age 15 within marriage. This creates negative messages about the level of protection afforded to children by the law.
- This case is important because marriage of young girls is prevalent in the country and a matter that needs concerted efforts to address.

Mwita Masabo vs. Republic [2002] CA

Principle or Rule Established by the Court's Decision

In a relationship where one has no monopoly over the sexual life of another, one is not expected to take offence if other parties are interested, despite the intimacy. Once it is accepted that the area recognises a custom such as *nyumba ntobo* (customary surrogacy) as a valid marriage, the test in determining legal provocation must rely on the principles guiding such relationship.

Judges: Lubuva, Mroso and Kaji | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal/ Appellate (Tanzania)	Criminal Appeal No. 56 of 2002	Forced marriage | Grave abuse

Case Summary

The deceased lady was "married" in 1985 to an older lady, one Nyangoko Mwita according to a custom known as *nyumba ntobo,* which is accepted among the Kurya and Ngoreme tribes in Mara Region. The custom is for the purpose of enabling a childless elderly woman to have children through surrogacy – that is, through the woman she "marries". The elderly woman/"lady husband" would be entitled to choose a man to have sex with the surrogate/"wife" all with a view of bearing children.

The deceased turned down a young man chosen by the "lady husband" to be the sexual partner; instead, she had sexual relations with the appellant, whom the "lady husband" did not approve of. Nevertheless, the "lady husband" tolerated him. The appellant occasionally spent his nights in the house of the deceased within the compound of the "lady husband" and sometimes the deceased went to spend nights at the appellant's house.

The appellant admitted to causing the death of the deceased lady. He stated that, on the day of the incident, he had found the deceased talking to a man on a path near his house. After the man had left, the appellant interrogated the deceased about the man but she responded rudely, which infuriated the appellant. He kicked her in the stomach and ribs, resulting in her death. The body, on being examined the next day, was found to have a wound extending from the vagina extending to the anus. The appellant denied being the one to inflict the said wound.

The appellant relied on the defence of provocation. At first, the appellant said in his defence that he considered the deceased to be his wife. However, he conceded that he was a mere paramour of the deceased because she had a "husband" according to their custom. The High Court convicted the appellant.

The appellant appealed to the Court of Appeal. The Court held that there was little doubt that the appellant and the deceased had developed between themselves a certain intimacy. But, once it is accepted that the custom of the area recognises *nyumba ntobo* as a valid marriage, the test in determining legal provocation must rely on the principles guiding such relationship.

In light of the fact that the deceased bore no uxorial responsibilities to the appellant, he had no right to take offence if he found her talking to other men. Furthermore, the words spoken to the appellant by the deceased merely asserted her right to freedom to speak to and associate with whomsoever she wanted to. The deceased had committed no wrongful act or insult against the appellant. She was acting within her lawful right to ward off undue interference with her freedom. While the words may have been unpleasant, they were insufficient to amount to legal provocation.

Points to Note

- The decision is one of a kind in that the Court showed understanding and recognition of customary practices in determination of the defence of provocation raised by an accused person.
- The Court decision is progressive in that it used customary law in refusing to accept the defence of the perpetrator, which would have departed from the accepted customs of a community.
- The Court considered the custom within the confines of known and essential components and requirements of the law on provocation, analysing whether the deceased owed any uxorial responsibility to the accused person. In recognising that the deceased was already married to another according to custom, the Court did not broaden provocation to be used as a shield to enhance abuse against already vulnerable individuals. The decision therefore protected women who comply with accepted and recognised community customary practices.

Rebeca Z. Gyumi v General [2016] HC

Principle or Rule Established by the Court's Decision

- A girl under 18 years is a child in law, and it is undesirable to subject her to complex matrimonial and conjugal obligations that expose her to serious health risks once married at such a young age.
- Legislative provisions that require consent of the parents or court mean girls are not free to make their own decisions. This is an infringement of their constitutional rights to equality and respect for dignity.
- Legislative provisions that differentiate between the ages at which boys and girls may enter into marriage are discriminatory and infringe on the constitutional right to equality.

Judges: S.A. Lila, S.S Kihio and A.A. Munisi | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Petitioner's prayers granted	High Court (Tanzania)/ Original Jurisdiction	Misc. Civil Cause No. 5 of 2016; delivered on 3 March 2016	Child marriage

Case Summary

Sections 13 and 17 of the Law of Marriage Act provide different ages of marriage for boys and girls. There is also a difference as to the requirement for parental consent. The petitioner challenged the constitutionality of the provisions, seeking that the provisions of Section 13 and 17 of the Law of Marriage Act be declared unconstitutional for contravening the following provisions of the Constitution, as amended:

i. Articles 12, 18 and 21(2) (the general right to equality and dignity of a person, the right to freedom of expression and the right and freedom of a person to participate fully in decisions affecting themselves). In particular, the provisions allow someone else to decide on behalf of another, by allowing parents to consent to marriage where the girl is 15 years old.

ii. Article 13 (the right to equality before the law). In particular, the provisions prescribe different minimum ages for boys and girls in relation to eligibility to marry.

iii. Article 11 (the right to education). In particular, it was contended that the provision allowing a girl of 14 years to be married with the consent of the court is too vague, can be arbitrarily interpreted and denies children's right to education.

The petitioner therefore sought that the provisions of Section 13 and 17 of the Law of Marriage Act be declared null and void and expunged from the statute book, with the age of 18 years maintained as the minimum age until the government amends the law.

The High Court ruled as follows:

i. There had been many legislative developments since the enactment of the Law of Marriage Act. These were presumably to ensure *"that the welfare and protection of the girl child is enhanced and the dignity and integrity of women is generally safeguarded"*. For example, the Sexual Offences Special Provisions Act (SOSPA) of 1998 imposes criminal sanctions on people who have sexual relations with children. Allowing child marriage would therefore amount to sanctioning criminal activity.

ii. In light of the clear steer against child marriage generally, the two provisions under Sections 13 and 17 of the Law of Marriage Act (which provide different definitions of the age of a child as well as giving differential treatment to girls and boys as far as the eligible age for marriage is concerned) had lost their usefulness.

iii. It was necessary to confirm the definition of the age of a child. An adequate definition of the age of a child is enshrined in Section 4 of the Law of the Child Act , which is "a person below the age of 18 years".

iv. It would be appropriate to correct the complained of anomalies within the provisions of Sections 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.

v. The two provisions enunciated under Sections 13 and 17 of the Law of Marriage Act, which, *inter alia*, require the consent of parents/guardian/the court for girls below 18 years before marriage, contravene the right to equality and right to expression as enshrined in the Constitution as amended.

vi. A girl under 18 years is a child in law, and it is undesirable to subject her to complex matrimonial and conjugal obligations that expose her to serious health risks once married at such a young age.

vii. Customary practices that affect children adversely cannot be said to cater to their best interests.

The Attorney General was given one year from the date of the order to correct the anomalies within the provisions of Section 13 and 17 of the Law of Marriage Act and put 18 years as the eligible age for marriage in respect of both boys and girls. The Attorney General has filed an appeal to the Court of Appeal challenging this decision.

Points to Note

- The case highlights international and regional instruments such as the African Charter on Welfare of the Child (1990) which Tanzania ratified on 16 March 2003; and reiterates the Government of Tanzania's efforts to legislate against sexual offences through the promulgation of the SOSPA in 1998, which amended the Penal Code and introduced a variety of sexual offences with very hefty punishments. The case and the various legislative developments matched public outcry to ensure that the welfare and protection of the girl child is enhanced and the dignity and integrity of women are generally safeguarded.

Other cases/decisions referred to	
Country/regional body	*Decision/reference*
Zimbabwe | *Loveness Mudzuru and Ruvimbo Tsopodidz v Minister for Justice, Legal and Parliamentary Affairs & others*	*In light of the overwhelming empirical evidence on the harmful effects of early marriage on girl children, no law which authorizes such marriage can be said to do so to protect 'the best interests of the child'. The best interests of the child would be served, in the circumstances, by legislation which repealed [the section which allows child marriage]. By exposing girl children to the horrific consequences of early marriage in clear violation of their fundamental rights as children [the Act] is contrary to public interest in the welfare of children. Failure by the State to take such legislative measures to protect the rights of the girl-child when it was under a duty to act, denied the girl children subjected to child marriages the right to equal protection of the law"*
SADC | Protocol on Gender and Development (2008)	Article 8(2)
African Union | The Maputo Protocol	Article 6

Uganda 

Uganda v Abiriga Michael alias Mayia & another [2016] HC

Principle or Rule Established by the Court's Decision

An offence will be aggravated for the purposes of sentencing if a child is forced into a relationship as mechanism for coping with its aftermath.

Judge: Stephen Mubiru | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Convicted	High Court (Uganda)	Criminal Case No. 0094 of 2016, s.129 Penal Code Act	Child marriage | Aggravated defilement

Case Summary

On 17 April 2012 at around 10 p.m., the victim left her home with a friend to buy paraffin. At one point, they branched off to a bar, where they met both accused persons. The victim's friend gave her two sachets of alcohol, which she drank. The four of them continued to drink. At some point, the victim's friend left. The victim stayed behind with both accused until around 2:30 a.m., after the bar had closed. By that time, the victim was drunk. The two

accused then dragged her into a nearby eucalyptus plantation where they threw her down. A1 held her by the neck while A2 forcefully had sex with her. When he had finished, A2 held her by the neck while A1 forcefully had sex with her. A1 later dragged her to his home, where he sexually molested her again.

The following morning, the victim returned home. She did not immediately inform her mother for fear of being beaten. The mother learnt about the incident from a neighbour and administered corporal punishment on the victim. The victim escaped from home and took refuge at a golf course. Her family searched for her and found her two days later. She narrated what had happened. The two accused were arrested. The victim was taken for medical examination. Although the HIV test of the victim soon after the incident was negative, a later confirmatory test revealed that she was HIV-positive. Her mother was so disappointed with the victim that she shortly thereafter allowed her to drop out of school and cohabit with a man, with whom she had had two children by the time she testified in court.

The High Court had to determine both guilt and any appropriate sentence. As to guilt, the point that somebody had sexually assaulted the defendant was not contested. The Court had to determine:

i. Whether the accused was under 14 years of age at the time of the offence.
ii. Whether it was the accused who had carried out the sexual attack.

The High Court found the accused guilty of aggravated defilement:

i. The evidence of the complainant, her mother and a doctor was all to the effect that the victim was 13 years old at the time of the incident. Using this evidence and the judge's own observation of the victim, the Court was satisfied that the victim was under 14 years of age at the time of the incident.
ii. Despite assertions to the contrary, both defendants appeared to fully incriminate themselves. The evidence of the complainant and her mother was credible and withstood cross-examination. The Court could therefore be satisfied that the two accused were the perpetrators.

As to sentencing, the Court found it appropriate to order that the accused spend the rest of their natural lives in prison. This was in light of the extreme repercussions caused by the convicts' defilement of the victim. The victim was found to be infected with HIV. She also was forced into homelessness after being rejected by her family. She was then forced into cohabiting with another man and was a child mother of two children.

Points to Note

- The trial judge gave priority to the suffering caused by this defilement while sentencing.
- The Court considered the effects of the sexual assault and found that the victim had been forced into early marriage and childbearing as a consequence of the gang rape. The gravity of the victim's suffering as a child mother and "wife" aggravated the offence and was considered as such during the sentencing. This effect is critical because studies have shown that victims of childhood abuse are three times likely to experience it as adults.[1]
- This case also illustrates the need for confirmatory tests to recheck the HIV status of the victim and the accused.

Uganda v Akandinda Jackson [2014] HC

Principle or Rule Established by the Court's Decision

No marriage, whether traditional or civil, may infringe constitutional principles. This includes any constitutional provision as to the minimum age at which a marriage contract can be entered into.

Judge: Rubby Aweri-Opio | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction	High Court (Uganda)	HCT-CR-CN-69/2014 (S.147 PCA)	Child marriage | Aggravated defilement

Case Summary

The victim was 15 years old. On the night of the incident, she had gone to contract a traditional Bakiga marriage, escorted by her family and friends. This involves a girl following a prospective husband to their home, after which the girl's family members follow and demand bride price. On arrival, they did not find the promised suitor, who was away on a business trip. As they were returning, the accused pounced on the victim and took her to his house, where he forced her into sexual intercourse throughout the night. The relatives and friends failed to rescue the victim from the accused. They reported the matter to the victim's father who, because of the victim's young age, took up the matter with the local authorities. This led to the arrest of the accused.

The accused's defence was that, in fact, the victim had gone to his home and not to the home of the suitor to initiate a traditional Bakiga marriage

with him. He testified that there was no chance for sexual intercourse because of the presence of the relatives and friends of the girl in the same house.

The High Court found that the medical evidence from three days after the incident clearly indicated signs that there had been sexual activity. The hymen had recently been ruptured, and the victim had traumatic inflammations of the vaginal walls, which were consistent with sexual force.

Even if a Bakiga marriage had been entered into, this provided no defence. The offence of defilement would have been committed by virtue of the victim's age. The marriage would have been illegal in any event, because of the complainant's age. The Constitution of Uganda provides that a person under the age of 18 cannot marry.

The accused was sentenced to three years' imprisonment. The Court noted that the offence was grave and merited the maximum of the death sentence. However, the accused was a first-time offender; he had been in custody for a long time; the victim was fairly close to the age of consent and she had gone to contract an illegal traditional marriage; the accused had committed an offence in forcing her into sexual intercourse; and the accused was a young man who should be given chance to reform and live a useful life.

Points to Note

- This case illustrates the dichotomy and conflict in society in the conduct of traditional and civil marriages.
- The sentence of three years' imprisonment may have been too lenient because the violence involved in the commission of the offence was not appreciated.

Uganda v Kiryagana Emmanuel [2011] HC

Principle or Rule Established by the Court's Decision

Compensation and caution are valid sentencing options in some circumstances of cases of VAWG, particularly where the best interests of the children involved warrant such a sentence.

Judge: Flavia Ssenoga Anglin | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	HCT-03-CR-SC-0053-2011, S.129 PCA	Child marriage | Aggravated defilement

Case Summary

The victim, who was 13 years of age, was approached by the accused, who was 17 years of age, for a relationship. The victim accepted. The accused took the victim to his home and introduced her to his parents as his wife. The father of the accused paid USh 150,000 to the victim's father so the victim could remain "married" to the accused. However, the mother of the girl, on learning of the circumstances, reported the matter to the police. The accused was arrested and charged with aggravated defilement.

In determining the appropriate sentence, the state attorney submitted that the country was trying to promote education of girls and boys and that the practice of marrying off underage girls hindered the process. The accused also knew that the victim was a young girl and the parents of the accused were to blame since they encouraged the girl to marry.

The defence counsel, *inter alia*, submitted that the accused was equally young at the time he committed the offence and was trying to form a family of his own. He equally respected the victim by engaging the parents in his plans although he was never properly guided. According to the defence counsel, the ages of the accused and victim, respectively, should be considered proof of evidence of peer pressure and cultural norms.

Prior to sentencing, the judge observed that the parents on both sides had behaved irresponsibly by not advising their children and encouraging them to enter into an illegal relationship.

The convict was cautioned and advised to concentrate on his studies and think of marriage when he is in position to support a family of his own and get a wife who is not underage.

Pursuant to Section 129(b) of the PCA, compensation may be a valid sanction if the factors so warrant. In fact, the victim's father had already received the compensation that ought to have been paid to the victim for the offence, in the sum of USh 150,000, paid by the parents of the accused.

Points to Note

- This case is one in which the Court sentenced with leniency, with the best interests of the children involved in mind.
- The case is an example of how some parents who are ignorant of the law and participate in the arrangement of child marriages contribute to increased occurrences of such VAWG.

Uganda v Mwanje Aggrey [2015] HC

Principle or Rule Established by the Court's Decision

The failure of a victim to attend court in answer to a witness summons may lead to the acquittal of an accused person in the event that the remaining evidence is insufficiently reliable or probative to reach the requisite standard of proof.

Judge: Eva Luswata | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Discharge on no case to answer	High Court (Uganda)	HCT/03/CR/ SC/0416/2015, S.129 PCA	Child marriage | Aggravated defilement

Case Summary

A 16-year-old girl was enticed by the accused and cohabited with him. When the victim's parents came to know about it, they reported the matter to the police. At the time of his arrest, the 16 year old hid and told the accused to hide from the police. The police convinced her to open the door. The police officer asked the accused what his relationship with the victim was. He told them that he had the intention of marrying the girl. He had had been sexually active with her and the victim was pregnant. The accused was HIV-positive.

In the judgement read out on 26 February 2018, the accused was acquitted following a submission of "no case to answer". The judge ruled that that a *prima facie* case had not been established:

i. Only two witnesses were called – namely, the arresting officer and the investigating officer. The Court was informed that witnesses were summoned and re-summoned but did not appear. The process server had not given reasons for the non-attendance of witnesses.
ii. There was therefore nothing to corroborate the evidence of the two witnesses who testified.
iii. The state must put the accused at the scene of crime before he is called on to put his defence, which the prosecution failed to do.
iv. The victim had not been called to testify and as such the age of the victim had not been proven beyond reasonable doubt.
v. No evidence was adduced to show that the accused was HIV-positive.
vi. The evidence of the two witnesses was neither sufficiently reliable nor probative to require the Court to put the accused to his defence.

The accused was discharged and released accordingly.

Points to Note

- Judges should use their powers to call for additional evidence pursuant to Section 75 of the TIA and should not hesitate to apply the penal provisions for lack of response to the summons. They therefore have varied means to ensure attendance at court. The Court could have accommodated further investigation into the whereabouts of the complainant or the victim's parents.
- It is prudent for judges to have a second look at VAWG cases paying attention to how they were investigated, prosecuted and adjudicated. There may be a need for reform to enable prosecutorial-led investigations for cases of VAWG since they have complexities that require special consideration.
- There are a number of ways to prove a victim's age –by a teacher, close relatives, medical evidence and the victim herself.
- It should also be noted that a conviction might stand without medical evidence where the other evidence is cogent and discharges the standard of proof.

Uganda v Nyanzi David [2016] HC

Principle or Rule Established by the Court's Decision

In every case, including VAWG cases, the court must weigh all of the aggravating and mitigating factors carefully to determine the appropriate sentence

Judge: Elizabeth Ibanda Nahamya | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction on plea of guilty under a plea-bargaining agreement	High Court (Uganda)	S.C. No. 116 of 2016, s.129(3)&(4)(b) PCA	Child marriage | Aggravated defilement | Incest

Case Summary

The accused pleaded guilty to having had sexual intercourse with his 15-year-old granddaughter. The victim had gone to visit her grandparents. The elderly couple had connived to "marry off" the victim to the accused as part of a customary surrogacy arrangement. The victim and her grandfather had sexual intercourse, with the intention that the victim would carry a child to term on behalf of her grandparents. The Court had to determine the appropriate sentence to impose.

The Court found that these circumstances were grave and therefore a deterrent sentence was required. In mitigation, the Court considered that the accused was a first-time offender; he seemed heavily influenced by his spouse; the accused was elderly; and he was remorseful and had pleaded guilty. However, the aggravating factors outweighed the mitigating ones and the convict was sentenced to 12 years and 8 months of imprisonment, including the period spent on remand.

Point to Note

- Customarily, everyone is expected to bear children and, where one fails to do so, arrangements may be made to enable a couple to have a child. This was a strange arrangement and unthinkable considering that incest is considered an abomination.
- This case is indicative of surrogacy in its most dangerous and crude form within the context of rural communities.

Uganda v Okello Steven [2015] HC

Principle or Rule Established by the Court's Decision

The court must take note of aggravating and mitigating factors and which outweighs the other to arrive at the appropriate sentence.

Judge: Kazibwe | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
5 years' imprisonment	High Court (Uganda)	H.C Crim. Ss. 093/2015, S.129 PCA	Child marriage | Aggravated defilement

Case Summary

The accused, at the age of 32, "married" a 17-year-old minor. They lived as husband and wife for three days. On the third day, he forced her out of the house. The victim had barely eaten and had been repeatedly engaged in sexual intercourse for the three days. She therefore passed out. The community members took her to a medical facility and reported the matter to the police. The accused was examined and found to be infected with HIV. The accused was convicted of aggravated defilement.

In sentencing the offender, the Court was asked to take into consideration that the victim had previously consented to the arrangement between her and the accused. The Court imposed a sentence of five years' imprisonment.

Points to Note

- The case illustrates a modicum of absurdity in respect of sentencing; a sentence of five years' imprisonment in view of the aggravating circumstances does not reflect the ideals of deterrence. The sentence should reflect deterrence in the spirit of the law. The accused had repeatedly had sexual intercourse with the victim and held her hostage to do so. He also exposed the victim to the risk of contracting HIV.
- The fact that she had previously consented to the arrangement was of no real consequence, seeing as he held her hostage and deprived her of food for days. All of this merited a stricter sentence.
- This case portrays the court exercising its judicial independence in coming to a decision. However, it shows a need for more authoritative guidelines.

Uganda v Okuni Dennis [2012] HC

Principle or Rule Established by the Court's Decision

Discrepancies in evidence that do not impeach the participation of the accused may be disregarded.

Judge: Elizabeth Ibanda Nahamya | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Session Case No. 0025 of 2012, S.129 PCA	Child marriage | Aggravated defilement

Case Summary

On 25 December 2011, the victim went to watch a film with three others, M, P and A. When the film had ended, they prepared to return home. M disappeared and the accused came up to the victim. The accused held her hand and told her M was calling her. He suggested that that they go to M. The accused took the victim some distance away from the video hall and the victim asked the accused where M was. He responded that he did not bring her to see M but wanted the victim as a wife. He proceeded to slap the victim as she resisted his advances. He eventually threw her down and then forcefully had sexual intercourse with her. After the incident, she went home and reported the incident to, among others, her aunt and to the police. The accused was arrested and charged with aggravated defilement.

The Court had to determine:

i. Whether the victim was of a "tender age".
ii. That a sexual act took place.
iii. That the accused committed the sexual act.
iv. Whether inconsistencies in the prosecution evidence meant that the Court could not be satisfied beyond reasonable doubt.

The Court ruled that:

i. Although the law does not define "tender age", the courts have over time laid down that it means any person below 14 years old. In this case, the evidence of the victim, her mother and a medical professional indicated that she was 12 at the time of the commission of the offence.
ii. The sexual act need not be accompanied by the tearing (rupture) of the hymen, ejaculation or visible injuries to the female's private parts. However, the existence of these features strongly suggested that, indeed, an act of sexual intercourse took place. The prosecution evidence proving this element was also not contested and the Court found that the ingredient was proved beyond reasonable doubt.
iii. In light of the decision in *Patrick Basoga v Uganda* [2002] CACA No. 42, the Court emphasised that a requirement to corroborate the evidence of a single identifying witness for sexual offences is unconstitutional. A court can therefore convict on the uncorroborated evidence of the victim if, after warning itself of the danger of convicting on the uncorroborated evidence, it is satisfied that the victim is truthful and her evidence is reliable. The surrounding circumstances and the familiarity of the victim with the accused in this particular case formed a cogent basis for the Court to rely on her evidence.
iv. There were some contradictions in the prosecution evidence relating to who may have examined the victim's private parts and who was told about the offence, and when. However, such contradictions were not related to the elements of the offence, on which the evidence was consistent.

The prosecution had proven its case beyond reasonable doubt and the accused was accordingly found guilty of the offence as charged.

Points to Note

- Uganda has no comprehensive law to address and define child marriages but the short-lived interaction between the accused and the victim bore the hallmarks of a child marriage because the

defiler claimed he had intentions of marriage. The lack of consent from the victim did not negate this intention that lay behind the sexual relationship.

- This is a case portraying the forceful nature that early marriage can take. The facts disclosed that the accused used deception and force to coerce the victim into having sex with him.
- This case is especially relevant because many girls are "married off" against their will. The vulnerability of the girl child makes her especially susceptible to forced marriage because the intersectional dynamics in rural communities dictate so.
- The guardian's reaction of threatening to beat her is indicative of the further traumatisation that victims encounter on reporting the abuse. The beating may be construed as an instinctive response, but it shows how the family of the victim may react in the circumstances. Social support for a victim is required to enable successful prosecution, reintegration and full recovery.
- More often than not, the evidence collected after such a traumatic incident has contradictions.
- The judge in this case concentrated on the identification of the defiler instead of the technical issues relating to said contradictions in reporting to the police. This is in line with the Article 126(2)(e) of the Constitution, by which judges are not to take undue regard of technicalities.

International Decisions

Prosecutor v Alex Tamba Brima, Bazzy Kamara and Santigie Borbor Kanu [2004] SCSL

Principle or Rule Established by the Court's Decision

Subjecting women to the full control of paramilitary commanders, where the women suffered complete deprivation of their liberty as their "wives", effectively created forced marriages.

Judges: Julia Sebutinde, Richard Lussick and Teresa Doherty | SCSL

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	SCSL (Special Court for Sierra Leone)	Case No. SCSL-04-16-T, with reference from the appeal (Case No. SCSL-2004-16-A)	Forced marriage

Case Summary

The accused persons participated in a joint criminal enterprise with the Revolutionary United Front of Sierra Leone, with the objective of taking any action necessary to gain and exercise political power and control over the territory of Sierra Leone, resulting in the commission of crimes against humanity – namely, murder, extermination, rape, sexual slavery and other forms of sexual violence, other inhumane acts (including physical violence) and enslavement, to mention but a few.

The Trial Chamber noted from testimony that women were captured. The young and particularly the beautiful women were placed under the full control of "commanders" and became their "wives". Many were murdered when trying to escape. In Bombali district, Kanu created a system to control the abducted women and girls. Any soldier who wanted a "wife" would go to Kanu to sign for her. He also enacted disciplinary measures against women who "misbehaved". In one instance, Kanu ordered a woman be given a dozen lashes and locked in a box for her suspected "misbehaviour". Once labelled "wives", the women and girls were ostracised from their communities.

Suffering a complete deprivation of liberty, these "wives" were forced to carry the soldiers' belongings and to cook for them. Acts of sexual violence were committed against the captured women. Those that became pregnant as a result of their forced marriage faced long-term social stigmatisation. The Trial Chamber inferred from the environment of violence and coercion that the women did not consent to these sexual acts. The Trial Chamber formed the opinion that the *actus reus* and *mens rea* elements of the crime of sexual slavery were satisfied on the basis of this evidence.

Points to Note

- The SCSL's recognition of forced marriage as a crime under international humanitarian law was an important step in recognising the unique experiences of women and girls during armed conflict. It was also an important step in recognising the gravity of GBV and the multiple forms this can take.
- The Appeal Chamber's decision broke from earlier interpretations of gender-based crimes as sexual in nature, looking at the crime of forced marriage through a wider lens and considering all implications of the forced conjugal associations.[2]
- This case stands out because it defined forced marriage, as a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force or coercion to serve as a conjugal partner resulting in severe suffering and physical or psychological injury to the victim.

- The case is a good example of the fact that evidence that may go to the proof of the elements of sexual slavery cannot always be limited to a particular place or a particular instant in time. Rather, given the prolonged nature of the crime alleged, some of the evidence given by a number of witnesses relates to events that take place over time, sometimes running through the indicted period for one district into the indicted period of other districts.

Notes

1 "People who were abused as children are more likely to be abused as an adult: Exploring the impact of what can sometimes be hidden crimes", Office of National Statistics, UK, www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/peoplewhowereabusedaschildrenaremorelikelytobeabusedasanadult/2017-09-27 (accessed 27 July 2018).

2 "Brima, Kanu and Kamara case", LSE Centre for Women's Security, http://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/brima-et-al-case/ (accessed 27 May 2019).