

A Article 19(2) of the CRC requires States parties to take:

2. Such protective measure ... as appropriate, . as well as other forms of prevention and for identification, reporting, referral, investigation, treatment and follow up of instances of child treatment and described heretofore, as appropriate, for judicial involvement.

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Tanzania ratified the CRC on 1 June 1990. In the present case the respondent exploited his special position of being a Madras-Islamic teacher of the complainant, lured her into his residence and raped her promising to marry her only to be abandoned and fail to honour his promise. Not realizing that the respondent was out to sexually exploit her, the complainant minor gave up her educational pursuits as a secondary and Madras pupil and went along with the respondent. Because the latter promised to marry her and upon his request that she does not disclose their love affair to her parents the complainant did not reveal the relationship until a neighbour, PW2 who had suspected the relationship alerted the complainant's mother. By then it was too late in the day for the complainant constructed pregnancy on the first day the respondent raped her.

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The complainant a minor was incapable of consenting for she lacked Chapter to consent pursuant to the provisions of section 130(1)(e) of the Sexual Offences Special Provisions Act Number 4 of 1998.

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In view of the above the defence of the accused lacked merit. The Trial Court therefore wrongly acquitted the respondent. The appeal has merit for the reasons stated above. Under the circumstances the acquittal by the Trial Court is quashed and set aside. The accused is guilty and convicted of rape as charged. The appeal is accordingly allowed.

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LEONARD JONATHAN v. REPUBLIC

HIGH COURT OF TANZANIA AT MOSHI

(Munuo, J.)

CRIMINAL APPEAL No. 53 OF 2001

(From the District Court of Hai, in Original Criminal Case No. 292 of 2000)

Criminal Law – Rape – Defence to a charge of rape – Appellant claiming to have contracted a Chagga customary law marriage by forcefully grabbing and having carnal knowledge of the “bride” – Whether constituting a defence to a charge of rape.

Family Law – Marriage – Contracting marriage – Appellant forcefully grabbed complainant and took her to his house and had carnal knowledge of her – Whether a customary law marriage was thereby contracted – Sections 2 and 9(1) of the Law of Marriage Act 1971.

Customary Law – Marriage under customary law – Whether a customary law marriage may be contracted without the consent of the bride – Sections 2 and 9(1) of the Law of Marriage Act 1971.

The appellant was, along with 3 other persons, charged with rape. The Trial Court convicted the appellant and acquitted the other three. The facts were that on the material day the complainant was going home from church when she met the appellant with the other accused and they grabbed her and carried her to the appellant's house. Inside the house the appellant assaulted her with assistance from another person who was never arrested and charged. In his defense the appellant claimed that he was in love with the complainant and wanted to marry her but she insisted on a Christian marriage which was too expensive for the appellant to afford. He therefore decided to marry her according to Chagga Customary rites by ambush and capture and carrying her to his house “to consummate” the marriage.

A **Held:** (i) There is no doubt that the complainant was forcefully captured and carried to the house of the appellant who then had carnal knowledge of her without her consent; the ingredients of the offence of rape were constituted;

B (ii) According to section 9(1) of the Law of Marriage Act 1971 a marriage, including a customary law marriage, means a voluntary union of a man and a woman intended to last for their joint lives;

C (iii) The complainant was captured and carried away and then carnally known in a violent transaction bestly executed against her volition; this negated anything called marriage under Chagga or any other customary norms;

D (iv) The right of the complainant to enter into a marital union only with her consent is protected by both the domestic law of marriage as well as international instruments to which Tanzania is a party.

Appeal dismissed

Statutory provisions referred to:

E (1) Penal Code Chapter 16, sections 130(2) and 131(3)

(2) Law of Marriage Act 1971, Number 5 of 1971, sections 2 and 9(1)

Mr Kakolaki for the Respondent

F **JUDGMENT**

(Delivered 21 September 2001)

G **Munuo, J.:** In Hai District Court Criminal Case Number 292/2000 four accused persons namely:

Accused number 1 Leonard Jonathan;

H Accused number 2 Stephano Jonathan;

Accused number 3 Anafoo Justine; and

Accused number 4 Jackson Elinewinga;

I Were jointly charged with rape contrary to sections 130(2) and 131(3) of the Penal Code Chapter 16 Volume 1 of the Revised Laws as

amended by the Sexual Offences Special Provisions Act Number 4 of 1998. It was alleged that on the 16 December 1999 at about 1800 hours at Masama Mula Village in Hai District within Kilimanjaro Region the accused had carnal knowledge of a girl aged 23 years, without her consent. The accused persons denied the charge. The Trial Court acquitted accused number 2 to 4 accused number 1 Leonard Jonathan, the appellant was convicted of the offence charged. He was sentenced to a term of 30 years imprisonment plus ten strokes of the cane. Aggrieved the accused lodged the present appeal to challenge the conviction and sentence.

The complainant, PW1, the daughter of PW3 Elinkira Samanga testified that on the 16 December 1999 she was going home from church in the company of PW2 Neema Mengishu. They found the appellant Leonard Jonathan and his co-accused on the way. The accused persons, who were known to them, caught the complainant and carried her to the house of the appellant Leonard Jonathan. In that capture the accused persons were armed with a matchet and sticks with which they threatened rescuers who responded to the victim's alarm. PW3 Elinkira Samanga, the father of the complainant got word of the captivity of his daughter.

He swiftly gathered force and was accompanied by PW4 Joram Mwasha, PW5 Goodluck Amani and PW6 Wilson Nsaro. The father's contingent broke the door of the appellant's house and released the victim who had unfortunately already been sexually assaulted by the appellant.

The complainant stated that when the co-accused carried her to the house of the appellant, the latter locked the door. In that room one Eshiwakwe Justine who is at large helped the accused by holding apart the legs of the victim while the appellant sexually assaulted her. When appellant had satisfied his lust, Eshiwakwe was ready for his turn but fortunately the victim's father broke the door open thereby interrupting the sexual assault by Eshiwakwe Justine who is at large. Dissatisfied with PW3's act of breaking the door and setting free his daughter who then ran home, the appellant struck PW3 with a

A stick on the back of his head causing him to fall down. His colleagues rushed PW3 to the hospital. Subsequently the accused persons were arrested and jointly charged with rape.

B The complainant reported the matter to the police. She got a PF3 form for treatment. Per her PF3 form, PW1 suffered strangulation to her neck, bruises in her vagina which was smeared with spermatozoa, bruises and haematoma on the knee joints and chest, dangerous harm inflicted by rape and the hands (blunt object). She tendered her PF C 3 form as (Exhibit P1).

In his defence on oath, the appellant admitted that he had carnal knowledge of the complainant. He claimed that he was in love with her and that had wanted to marry her but that she insisted on a Christian marriage which he could not afford. He then decided to ambush, catch and marry her under Chagga customary marriage norms, he stated. He said people pressed the complainant to go to the hospital and take action against him. The appellant took responsibility for the rape denying that his co-accused were involved in the matter.

In his twelve grounds of appeal the appellant denied the offence contending that his guilt was not proved beyond all reasonable doubt. He further contended that the ingredients of the offence were not established by the prosecution. He faulted the credibility of the prosecution witnesses and observed that no torn clothing was tendered to establish rape he insisted that he, on the material day, married the complainant under customary norms so he committed no offence. He rejected that PF3 form (Exhibit P1) as being of no weight.

The appellant faulted the trial magistrate for not finding the defence of contracting a Chagga customary marriage with the complainant on the fateful 16 December 1999 probable.

Ms *Makala* learned State Attorney supported the conviction and sentence on the straight forward and strong evidence adduced by the complainant which evidence was fully corroborated by PW2, PW3, PW4, PW6 and also by the PF3 form Exhibit P1.

The issue is whether the accused raped the victim or married her under Chagga customary law as he maintained in his defence and in ground seven of the appeal.

There is no speck of doubt that on the evidence on record and in law the prosecution established the guilt of the appellant beyond all reasonable doubt. The evidence of the complainant was fully corroborated by her PF3 form Exhibit P1 which shows that she suffered bruises in her vagina which was smeared with spermatozoa; she suffered a bruised left knee and chest and a strangled neck; all injuries caused by the violence the appellant deployed on the victim. The appellant sexually assaulted the victim with the assistance of a co-suspect, one Eshiwakwe Justine who is at large. The latter held the victim's legs apart thereby giving the appellant access to her vagina. The appellant muzzled the victim to prevent her from crying out but she did cry out all the same for PW3, PW4, PW5 and PW6 did hear her cry in the locked room which PW3 broke thereby releasing her.

The complainant was forcibly caught, carried to the appellant's house by a gang of five men including the appellant. The co-accused were armed with a machet and sticks to keep off people who wanted to intervene. It was the victim's brave father who broke open the door of the assailant setting the complainant at liberty. She quickly dressed and ran home. The complainant was captured and carried to the house of the appellant with the assistance of his four co-suspects. He then locked the room and with the help of his colleague Eshiwakwe Justine who has since remained at large, the appellant sexually assaulted the victim. The complainant did not consent to the carnal knowledge. Under those circumstances the ingredients of the offence of rape were constituted thereby rendering the appellant liable of raping the complainant as charged.

The defence of contracting a Chagga customary marriage through the rape is improbable and fallacious in fact and law.

A The Law of Marriage Act Number 5 of 1971 governs all legally recognized marriages including customary law marriages. Section 2 of the said Act defines marriage as follows:

B Section 2 "marriage" has the meaning attributed to it in section 9, and any reference to a marriage means a marriage whether contracted before or after the commencement of this Act and whether contracted in Tanganyika or elsewhere.

C Section 9 of the Law of Marriage Act Number 5 of 1971 defines marriage:

9(1) Marriage means the *voluntary union* of a man and a woman, intended to last for their joint lives.[emphasis supplied]

D The appellant admitted in his sworn defence that he captured and carried away the victim whereafter he had carnal knowledge of her without her consent apparently because he could not afford a Christian marriage. As I stated earlier the victim did not consent to the rape, she was bruised and humiliated by the entire violent transaction which was beastly executed against her volition which completely negated anything called marriage under Chagga or other customary norms.

F The complainant is protected by the domestic Law of Marriage Act Number 5 of 1971 for without volition there can be no marriage between parties intending or contracting a marriage. She is further protected by International norms notably under the provisions of Article 4 of the 1993 United Nations Declaration on Elimination of Violence Against Woman (DEVAW) which calls on states to protect and offer adequate relief to women victims of violence and calls on States to condemn violence against women and not invoke custom, tradition or religion to avoid their obligations.

H The complainant is also protected by Article 14 of the 1948 Universal Declaration of Human Rights which gives adults the right to choose ones spouse and the right to voluntarily marry the particular spouse by stating:

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(1) Article 14(1) Men and woman 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 right 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 spouse*. [emphasis supplied]

Article 14(2) of the Universal Declaration of Human Rights is akin to the provisions of section 9(1) of the Law of Marriage Act Number 5 of 1981 which have conditions of volition and the consent of the intending spouses for a valid marriage.

Finally there are the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1981 Article 2 of CEDAW calls on states to modify or abolish discriminatory laws, regulations customs and practices. See: *Towards a Jurisprudence of Equality – Training Manual* by Justice Natalia Kimaro and Pellagia Khaday, Dar es Salaam 2001 Tanzania ratified CEDAW on 17 July 1980.

Article 16(b) of CEDAW guarantees the right to freely choose ones spouse and marry on ones volition by stating:

Article 16. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into a marriage only within their free and full consent.
- (c) to (h) ...

The complaint's fundamental human right of marrying voluntarily is also protected under Article 23 of the Convention on Civil and Political Rights, 1966 which became effective in March 1976 and which was ratified by Tanzania on 11 June 1976. Article 23 of CCPR states:

- A Article 23.
1. The family is the natural and fundamental group unit of society and is entitled to protection by society and state.
 - B 2. The right of men and women of manageable age to marry and to found a family shall be recognized.
 3. No marriage shall be entered into without the free and full consent of the intending spouses.
 - C 4 ...

D In view of the above provisions of domestic and international law, the appellant seriously offended the complainant's fundamental right to choose her spouse and marry on her own volition. Those circumstances reinforce her complaint of rape which I have already observed, was proved beyond all reasonable doubt for she never consented to the appellant carnally knowing her nor marrying her under the obnoxious customary practice of grabbing women, locking them up and sexually assaulting them in the name of Chagga customary marriage.

E All in all the appeal is devoid of merit. The sentence is statutory under the Sexual Offences Special Provisions Act Number 4 of 1998.

F For those reasons the appeal is dismissed in its entirety. It is so ordered.

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UMOJA GARAGE v. NBC HOLDING CORPORATION

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Makame, Kisanga and Lubuva, JJ.A.)

CIVIL APPEAL No. 3 OF 2001

(Appeal from the Ruling of the High Court of Tanzania at Dar es Salaam, Mackanja, J. dated 12 November 1999, in Civil Case No. 63 of 1999)

Civil Practice and Procedure – Res judicata – In the previous case the plaintiff sued the defendant for a declaration that he (the plaintiff) was not in breach of agreement with the defendant and for an order determining the agreement – In the subsequent suit the same plaintiff sues the same defendant for a declaration that it was the defendant who was in breach of the agreement – Whether the doctrine of res judicata applies – Section 9 of the Civil Procedure Code 1966.

Under an agreement between the parties the appellant obtained a certain amount of money from the respondent as a loan, the appellant mortgaging his property as security for the repayment of the debt. The respondent also undertook, to supply machinery equipment to the appellant. There was a long delay in the supply of the machinery, and when it was supplied it was partly deficient and partly second-hand. Next, the respondent demanded the repayment of the loan, threatening to sell the property mortgaged if the appellant failed to do so. The appellant then sued the respondent in the High Court successfully for a declaration that he (appellant) was not in breach of the agreement to warrant the sale of his property, and an order determining the agreement. Thereafter the appellant instituted another suit against the respondent in the same Court seeking a declaration that it was the respondent who had breached the contract. The suit was dismissed on the ground that it was barred by the principle of *res judicata*. On appeal to the Court of Appeal, it was considered whether the principle of *res judicata* was applicable.