

Searching for the will to conscientiously prosecute sexual crimes in Zanzibar

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Introduction

The passage of the Sexual Offences (Special Provisions Act) (SOSPA)¹ in 1998 intended to promote the prosecution of crimes of gender based violence (GBV) more broadly. Specifically, it sought to strengthen the protection of victims and survivors of sexual violence. In 2004, the Zanzibar legislature, the Zanzibar House of Representatives, amended SOSPA further including it in Part XV of the 2004 Zanzibar Penal Act with the objective of making the law more readily accessible to functionaries in law enforcement and the judiciary, and therefore facilitate its implementation.

Since the legislative victory, few efforts have been made in the isles to ascertain whether the law is living to its promise of availing victims of GBV better protections and justice. This article seeks to review avail-

1. Act No. 7 of 1998.

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able case law on sexual crimes to examine the extent justice institutions seek to implement the intention of SOSPA and the Zanzibar Penal Act of 2004. Hopefully, the insights obtained from this inspection will enable activists and public officials consider further legal and extra legal measures necessary to afford victims and survivors of sexual violence greater protection under the law as well as institutionally.

A problem buried in contrast to its enormity

The case law on crimes against morality is scant. For this study, a total of ten cases were available for review. Very few of the cases involving sexual violence that are heard at district and regional courts go on appeal to the High Court. This is in spite of the fact that there is a greater likelihood for miscarriage of justice at courts of first instance. At the time of this research, the cases that were available in the High Court Criminal Registry involved coerced sexual crimes. Most of the cases involved incidents of sexual assault by a male adult on male or female children, mainly adolescent girls.

The few cases that made it to the High Court are often dismissed on technicalities, not so much on the substance of the law. Perhaps for this reason, Zanzibar is yet to develop her own body of precedent with regards to sexual crimes or the standards under which specific sexual crimes would be defined and tried. Moreover, there are very few conviction rates for sexual crimes. Among the cases reviewed there was only one conviction in the case of *R v. Mzee Abdulla Suleiman* or the *Kitangi case* which we will refer to later. This begs the question of whether the new law facilitates convictions of people charged with sexual crimes or makes it harder to convict and punish them as envisaged by the law.

On the whole, reviewed cases indicate that fewer wom-

en report sexual crimes against their persons, a fact also established by the GBV Zanzibar Study². This may be partly due to the fact that they may feel ashamed to publicize the violation against their person in a society that predominantly still blames the victim for bringing the misfortune on themselves. But perhaps a bigger factor is the prevailing practice to establish whether a sexual offense has taken place or not, one that requires the deflowering of a girl or woman. Since women are less likely to be virgins, they cannot prove forced entry!

Cases in the Zanzibar High Court Criminal Registry show that there is a high incidence of child sexual abuse in the isles, a fact that is also confirmed by the GBV Zanzibar Study. The case files indicate that the children were being sexually assaulted on a regular basis. Many of these children are under 12, with the oldest sexually assaulted child, being a girl of 16 while the youngest, at the time of the trial was eight years old. The suspects are usually people very close to the children, in a care relationship to the child like an uncle, a *madrasa* teacher³, a neighbour, which may explain the fact it takes a while before a parent becomes aware of the crime being committed.⁴

Cases doctored to fail

In a number of cases, charges against the accused are dropped because the court finds that based on the evidence the accused has been wrongly charged⁵. In a few cases the charges are amended often from a more serious charge of rape to a less serious charge of indecent assault.⁶ For example, in *R vs. Khalifa Hassa*

2. The Zanzibar GBV Prevalence Study sponsored by the Ministry of Labour, Youth Women and Children Development.

3. A religious school teacher.

4. A similar finding was made by the Horizon Study where among the 21 women who reported being sexually abused before the age of twelve, eight were abuse by a family members, five were abused by a neighbour, three were abused by a family friend, two by a male worker in the house and two by a stranger and one by a male friend.

5. *R vs. Amton Rafiel Saimon*, for example, the accused was charged for rape but court ruled he was charged under a wrong section and he must have been charged for defamation.

6. See for example the case of *R vs. Khalifa Hassan* where the original charge sheet stated the offence as *kubaka* or

Kaita, the charge sheet was amended to read indecent assault even though sex had clearly happened for fear that a rape charge would not stand. In view of the fact that this case was filed after the law was amended, requiring a minimum standard of proof to convict an accused person, one wonders why a charge of grave sexual assault under §156 was not substituted instead considering that the crime is more severe and the standard of proof less strict.

Changing the charges routinely results in fewer convictions of those accused of sexual crimes; or in case of conviction, to the accused being tried on a lesser charge, which ultimately attracts lower prison terms or compensation amounts. If this is the case, it begs the question why the Director of Public Prosecution (the DPP) who commonly tries criminal cases on behalf of the state is not willing to revise a losing strategy in protecting victims and survivors of gender based violence.

The records on file, as well as the GBV Zanzibar Study, suggest strongly that a weak prosecution of GBV related cases, especially crimes of a sexual nature begins not in the court room but with the arrests and drawing up charges. As it is police officers and the DPP seem to be fumbling with the law, not being quite sure what charge will make a conviction stick. Alternatively, it is they, and not the court, who rule on the merit of the case deciding what charge is appropriate or not to convict the accused. Moreover, it is questionable why the prosecution feels obliged to charge the suspect narrowly when the law allows for multiple charges to be drawn up increasing the risk of being found guilty under multiple counts instead of a single charge.

Importantly, the weakness in drawing up appropriate charges against persons accused of committing sexual crimes may indicate the presence of bigger issue in need of resolution. Chiefly, it could indicate that the law is impractical as it is and may need to be amended to facilitate the course of justice, especially for victims and survivors of violence. Secondly, it could suggest that there is an urgent need to strengthen the capacities of prosecutors in drawing charges and prosecuting sexual crimes.

Equally important to review is the practice of law enforcement functionaries in how they handle sexual assault cases. The GBV Zanzibar Study indicated that rape but was actually convicted on indecent assault.

many cases fail for lack of strong evidence to make the charges stick beyond a reasonable doubt. In the ten cases reviewed, in only one was the child examined within twenty-four hours of the assault, something that facilitated conviction⁷. Instead the records show how evidence is being destroyed, many times unknowingly, such as by parents or guardians washing the child; but also because of poor judgment of the attending police officer or the investigating officer⁸. Indeed, it is not uncommon for these public officers to delay investigating the crime or seek to make a deal between the parties so that there is less work to do and they gain some benefit from the deal.

Furthermore, while activists have been demanding for legal institutions to deal more forthrightly with rape incidents, especially incidents committed against children this is far from the reality in Zanzibar⁹. Although the amount of bail has been increased, none of the case files reviewed charged bail under USD100, about one and a half months salary. To post bail, an accused demands two sureties and a letter from the *Sheha*¹⁰, to guarantee the applicant. In most cases the *Sheha* does not object to the posting of bail, even if it concerns someone who is notorious for sexually abusing children or for harassing women.

Prosecuting the crime is also rendered difficult on account of the jurisdiction of courts. While the statute prescribes maximum sentences, in actual fact these are hardly pronounced because courts of first instances have limited jurisdiction in passing out actual sentences. For example the maximum sentence a court of first instance can hand down is 7 years imprisonment. Consequently, sentences passed are not as harsh as envisaged under the Act, ranging from a few years in jail, with or without corporal punishment.

7. *R vs. Abrahman Suwedi Samalia*

8. When someone goes to the police with a complaint, the first person they meet is a desk officer who simply records the complaint. The case is then assigned to an investigating officer. Many times connecting with an investigating officer can take days.

9. Some for instance want the crime to be equated with murder and to deny those accused of sexual violation bail especially since granting them bail ultimately results in their freedom.

10 An official presiding over the smallest administrative unit of local government, the *Shehia*.

Applying an uncertain standard of proof

To prosecute a rape crime the court requires a *prima facie* case of rape. This means that there must be proof that there was carnal knowledge which is established and corroborated by penetration. However, the current law does not specify the object of penetration, although it is assumed to be the male sexual organ. Accordingly, under the law, women cannot be accused of rape.

The law requires proof of illicit or unlawful sex to establish a carnal crime. This is established by proving that the parties are not legally married or separated; and that both have capacity to consent to the sexual act. Also it is immaterial, in law, whether or not there is ejaculation or force. Yet, the practice of courts has been to neglect this legal standard and to instead apply a more personalized standard. Thus while in at least seven of the cases reviewed there was proof of penetration, the court considered the fact that there was no semen to associate the accused with the crime when making a ruling. In another instance, prior sexual activity raised doubt as to the “immediate” incidence of rape such that the cases of children who were found to habitually engage in sexual activity by the court were dismissed because there was no obvious incidence of bruising or tearing which coincidentally are not the legal standards to determine the crime of rape.

Furthermore, in at least seven of the cases the court dismissed the case not because it failed to establish that intercourse did take place, but because it suspected that there was a more sinister motive on the part of the parent or guardian of the victim to bring the case. This was the situation when a mother tried to bring her son’s *madrassa* teacher before the law after she suspected him of sodomizing her son. Effectively, the legal battle ceases to be about the victim, and is transformed to be about settling scores between the accused and the parents of the victim. In other instances the court is influenced by the testimony of persons who do not have authority to give expert opinion. For example in one case the court followed the opinion of the victim’s mother who concluded that there was no penetration because her daughter could walk by herself and not because a medical examination had proved otherwise.¹¹

11. *R vs. Khalifa Hassan Kaita*.

Other standards inferred from the cases reviewed include shifting the onus, even in making an arrest against a suspect, on the person alleging the crime!¹² Since almost all of these cases involve minors it suggests strongly that the onus is being shifted to a person who legally is incapable of consenting to the crime to prove that a crime was indeed committed against their person contrary to the law which criminalizes intercourse with a minor even if the minor consented to the sexual act; or if the minor misrepresented their age¹³. Also, the law rules out consent obtained by giving money to a child or through threats¹⁴.

Corroboration is required and established if another party witnesses the crime or becomes privy to the information first hand such as by the confession of the accused person.

All the while the law does not allow corroboration from the child, who often is the only party who can speak with authority about what was done to them. Otherwise, there is the problem of hearsay in admissibility of evidence. It is interesting to note that while risk to contaminate others with HIV/AIDS aids influences courts to make a conviction to deter others from the practice, not a single court ordered an HIV/AIDS test or other types of tests to determine if the child has been infected with STDs/STIs, even where evidence suggests that the child is emitting some foul discharge¹⁵.

Powerlessness, Vulnerability and Equal Protection

Consistently, the court penalizes children for not reporting the crime immediately after it happens without regard to the Statute of limitation¹⁶. This is done

12. In *R vs. Shehe Juma Ame*, for example, an imbecile was raped in her home. Her brother caught them in the act but in dismissing the suit the court reasoned that the brother should have caught and overpowered the suspect in the act, since he was in a compromising state.

13. This is a significant departure from the old law where a suspect could claim being misled as to the age of his female victim.

14. §145 (B).

15. In *R vs. Ame Ramadhani* court establishes presence of vaginal and anal sex

16. In one case the Magistrate dismissed the case because the victim reported the offence to his grandmother

in spite of the fact that numerous studies confirm that given the nature of the crime, it is quite normal for children to feel angry and even reclusive about what has happened to them¹⁷. The *Lancet*, for instance, notes that most forms of violence are not unique incidents but are ongoing and can even be continued for decades.

The question of informed consent influences not only public opinion but also the bench in so far as sexual crimes are concerned. In the only case where there is an outright conviction, *the Kitangi case*, the boy was considered too young to agree to a sexual encounter. The *Kitangi case* involved a 50 year old man accused of sodomizing a five year old boy. This followed a protracted period of media reports of young boys being abused sexually. Mzee Abdulla Suleiman was consequently apprehended and convicted on the evidence of his young victim. Also, the fact that there was bruising on the young boy indicated to the court that he was forcefully entered. Nevertheless, courts have not always ruled in favour of abused children more so when they are assumed old enough to acquiesce to the advances of the adult, even if in fact they are still minors under the law as is demonstrated by the bulk of cases cited herein.

Victims and survivors of violence appear as a star witness in their own case. What they say depends very much on what they are asked by the prosecutor. An accused person can seek mitigation for his crimes. This makes it hard for victims to emphasize the gravity of the crime committed against their person but allows an aggressor the benefit of negotiating for their liberty/life something a young person when violated is denied.

Whereas the UN In-depth Study on VAW acknowledges that VAW is both a cause and a consequence of deeply ingrained inequality between men and women the law and legal practice evidences favouritism on account of sex in addressing incidents of sexual crimes. For example bail for crimes involving sodomy, which mostly involve young boys, is routinely posted high-

on the third day while the Statute of Limitation in criminal cases does not place such restriction in prosecuting an offence once it becomes known.

17. See for example S.F Rumisha (2004), "Child Violence and Sexual Abuse in Tanzania" or WHO (2006) "Global Estimates of Health Consequences due to Violence against Children".

er than in cases involving rape which mostly involve young girls.¹⁸ Also the likelihood to believe and find in favour of a male victim is greater than in cases female children are defiled. Yet medical personnel interviewed at different locations for the GBV Zanzibar Study, as did the reviewed cases, confirmed that a high number of female children exhibit prolonged sexual activity, strongly suggesting that underage girls are subjected to protracted incidences of sexual abuse which remain largely unaddressed.

Zanzibari society seems more likely to tolerate sexual activity with minor girls, as long as they are married to someone. However, the law prohibits older but unmarried girls i.e. “spinsters” engaging in sexual activity lest they lose their chastity. No similar concern is shown towards male children. Moreover support services for survivors of GBV are inexistent, inadequate or shunned (Banda, 2003). The impunity perpetrators too often enjoy results in part from the trivialization of GBV issues. Likewise, the victims of abuse may be threatened during or after legal process something that may affect their willingness to persist with the legal process.

Conclusion

Sexual Offenses (Special Provisions) Act is a testament to legislative reforms in light of growing sexual crimes against young children of both sexes, as well as women. Existing anomalies in dealing with GBV institutionally, though acknowledged by public officials and civil society generally, continue unchecked. The impasse in firmly dealing with GBV crimes may directly impact people’s willingness to pursue and prosecute GBV crimes. Also, the reluctance of judicial officers as well as law enforcement officers to proactively address the weaknesses in law and in practice suggests that while there is a revolutionary piece of legislation to tackle GBV crimes, specifically sexual crimes, there lacks a will among those vested with the responsibility to interpret and implement the law in a manner that ascertains that the legal objective is met.

18. e.g. in case of *R vs. Ahmed Twahiri* bail was set at Tshs.500,000 while bail was posted at the same amount in only one rape case. Otherwise the bail rates were relatively less for other types of sexual crimes e.g. indecent assault at about Tshs. 100-300

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7. The Laws of Zanzibar, Evidence Decree (1917) Cap 5
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C. Case Law

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6. *R vs. Amton Rafiel Saimon*, Criminal Case No.113 of 2002
7. *R vs. Khalifa Hassan Kaita*, Criminal Case No. 49 of 2005
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10. *R vs. Shehe Juma Ame*, Criminal Case No.119 of 2001

ACRONMYS

AIDS	Acquired Immune Deficiency Syndrome
CSO	Civil Society Organization
DAW	Division on the Advancement of Women
DV	Domestic Violence
e.g.	for example
i.e.	that is
GBV	Gender Based Violence
HIV	Human Immunodeficiency Virus
HRW	Human Rights Watch
MLYWCD	Ministry of Labour, Youth, Women and Children Development
MoHSW	Ministry of Health and Social Welfare
PF3	Police Form 3
R	Republic
SOSPA	Sexual Offences (Special Provisions Act)
STDs	Sexually Transmitted Diseases
STIs	Sexually Transmitted Infections
UN	United Nations
VAW	Violence Against Women
vs.	versus
WHO	World Health Organization
Tshs.	Tanzanian Shilling
USD	United States Dollars

DEFINITION OF TERMS

The bench: refers to members of the judiciary hearing a judicial matter i.e. magistrates or judges.

Kadhi: A Muslim judge with authority to conduct marriages. In Zanzibar it is an official position.

Sheha: a government representative at the basic level of governance in the local government structure in Zanzibar i.e. a neighbourhood.

The Isles: refers to the Islands of Unguja and Pemba making up the semi autonomous state of Zanzibar.