

**A CRITICAL ANALYSIS OF EFFECTIVENESS OF THE LAW  
TO CURB SEXUAL VIOLENCE AGAINST CHILDREN  
A CASE STUDY OF ZANZIBAR (UNGUJA)**

**By**

**Asha Mohammed Ahmed**

**Dissertation Submitted in Partial Fulfillment for the Requirements of the  
Award of Degree of Master of International Law (LLM- IL) of Mzumbe  
University**

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**CERTIFICATION**

We, the undersigned, certify that we have read and hereby recommend for acceptance by the Mzumbe University, a dissertation titled: **“Effectiveness of the law to curb sexual violence against children: A critical analysis. Case study of Zanzibar”**, in partial fulfilment of the requirements for award of the Masters Degree of Laws in International Law (LL.M) of Mzumbe University.

\_\_\_\_\_  
Major Supervisor

\_\_\_\_\_  
Internal Examiner

\_\_\_\_\_  
External Examiner

Accepted for the Board of Faculty of Law

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## DEDICATION

My beloved husband *Mohammed* and to my beloved sons *Muntasir, Muntasim, Muntahir* and daughter *Intisar*

## ABBREVIATIONS

AG	-	Attorney General
AIDS	-	Acquired Immune Deficiency Syndrome
CRC	-	Convention on the Right of the Child
DNA	-	Deoxyribonucleic Acid
DPP	-	Director of Public Prosecution
GBV	-	Gender Based Violence
HIV	-	Human Immunodeficiency Virus
MoHSW	-	Ministry of Health and Social Welfare
OAU	-	Organization of African Union
OIC	-	The Organization of Islamic Cooperation
SOSPA	-	Sexual Offence Special Provision Act
STI	-	Sexually Transmitted Infection
SVAC	-	Sexual Violence Against Children
TAMWA	-	Tanzania Media Women Association
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
UNICEF	-	United Nations Children's Fund
UNSG	-	United Nation Secretary General
VAC	-	Violence Against Children

- WHO - World Health Organisation
- ZAFELA - Zanzibar Female Lawyers Association
- ZLS - Zanzibar Legal Service
- ZLSC - Zanzibar Legal Service Centre

## **LIST OF STATUTES**

### **INTERNATIONAL AND REGIONAL INSTRUMENTS**

African Charter on Human and Peoples' Rights, 1981

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

Convention on Domestic Workers, 2011

Convention on the Elimination of All Forms of Discrimination against Women, 1979

Convention on Persons with Disability, 2008

Convention on the Rights of Children, 1989

The African Charter on the Rights and Welfare of the Child, 1990.

Universal Declaration of Human Rights 1948

### **LEGISLATIONS**

Kadhi's Courts Act 1985

Marriage and Divorce (Muslim) Registration and Divorce Decree (Cap. 91)

The Constitution of Zanzibar 1984

The Criminal Procedure Act 2004

The Penal Act 2004

The Zanzibar Aids Commission Act 2002

## LIST OF CASES

“C.K. (A Child) & 11 others vs. The Commissioner of Police & 2 others.”[2002]eKLR

“C.K.(A Child) Through Ripples International As Her Guardian And Next Friend) & 11 Others v. Commissioner Of Police/Inspector General Of The National Police Service & 3 Others”[2013]eKLR

“R vs. Mzee Abdulla Suleiman, Criminal Case No.224 of 1995”High Court of Zanzibar (unreported )

“R vs. Ame Ramadhan Muombwa, Criminal Case No.64 of 2003”Regional Court of Zanzibar (unreported)

“R vs. Amton Rafiel Saimon, Criminal Case No.113 of 2002”Regional court of Zanzibar ( unreported)

“R vs. Khalifa Hassan Kaita, Criminal Case No. 49 of 2005”High court of Zanzibar (Unreported)

## ABSTRACT

This study is about the effectiveness of the law to curb sexual violence against children (SVAC) in Zanzibar. Studies have shown that, sexual violence against children incidence is increasing. The research was aimed at finding the available shortcomings or gaps in the laws and poor enforcement of the laws. Other factors that contributes to the predominance of SVAC in Zanzibar that prevent the effectiveness of laws in combating it. The researcher examined the national and international legislation pertaining SVAC for the aim of assessing its effectiveness in curbing sexual violence against children in Zanzibar.

This study is a combination of both qualitative and quantitative methods which was meant at enabling collection of detailed information about the problem. The researcher used interview guides and questionnaires as tools of collecting detailed information from the respondents. The method of sampling used in this study is non-probability.

The study findings reveal various gaps for handling sexual violence against children in the country. Consequently, Zanzibar's legislation does not define sexual violence. On the contrary, those provisions formulated do not distinctly address SVAC and the marital rape is legalized in Zanzibar laws. There exists a practise of rapist marrying the victim as the means to avoid the rape charge. The law is silent on this practice which leads the trauma to the victim. Also the study reveals that there is a practice of unofficial compensation arrangements between the victim or victim's family and the assailant intended to replace criminal justices system..

Therefore the researcher recommends that the laws should be reviewed and amended to address *lacunae* as revealed by the study. Above all, it should allow the private criminal investigation so that the cases and evidence of the cases will not be hampered. There is also a need to develop a respective national policy guideline for the child victim of sexual violence for medical professionals, police investigators, prosecutors and institution concerning with social development.

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## CHAPTER ONE

### INTRODUCTION

#### 1.1 Introduction.

In Zanzibar, as many parts of the world, violence against children is a serious problem. Violence against children is critical violation of human rights; social and public health issue as well as its consequences can be devastating<sup>1</sup>. No country is immune, whether rich or poor. Violence erodes the strong foundation that children need for leading healthy and productive lives, and violates the fundamental right of children to a safe childhood.<sup>2</sup> Violence against children is never justifiable nor is it inevitable. If its underlying causes are identified and addressed, violence against children is entirely preventable.<sup>3</sup>

The Convention on the Rights of the Child (CRC) states that all children have the right to be protected against all forms of violence, exploitation and abuse, including sexual abuse and sexual exploitation. The short and long-term consequences of such violence are severe, not only for those who experience the violence, but also for the families and communities, and constitute a critical societal concern.<sup>4</sup>

According to the World Report on Violence and Health, child abuse or maltreatment “...constitutes all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child’s health, survival, development or dignity in the context of a relationship of responsibility, trust or power.”<sup>5</sup> This definition encompasses physical, emotional and sexual forms of violence. There is little accurate data on the prevalence of violence against children worldwide. Available information, however, including the United Nations Secretary-General’s (UNSG)

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<sup>1</sup> Violence against children in Zanzibar 2011 Excerpt from a National Survey on Violence Against Children in Tanzania 2009 pg3

<sup>2</sup> ibid

<sup>3</sup> ibid

<sup>4</sup> RuyanD,wattanC,IkedaR,Hassan,F,andRamiroL. Child Abuse and Neglect by parent and Other Caregivers.in world Report on Violence and Health .KrugEG, Dahlberg LL,Mercy JA, Zwi AB,AND Lozano R,Eds.Geneva :World Health Organization ;2002

<sup>5</sup> ibid

World Report on Violence against Children (VAC, 2006), indicates that violence against children is a major problem that exists across countries. A study on child disciplinary practices at home, with data from 35 low and middle income countries, indicates that on average, three in four children between the ages of 2 and 14 were subjected to some kind of violent discipline with more often psychological than physical. While almost three fourths of children experience psychological aggression, about one-half experience physical punishment.<sup>6</sup>

The calamity of sexual violence is particularly sensitive. The data generated by World Health Organisation (WHO) shows that many girls child under the age of 18 experience sexual violence involving physical contact than boys child.<sup>7</sup> “The 2005 WHO Multi-Country Study on Women’s Health and Domestic Violence against Women found that between 1% and 21% of women surveyed experienced sexual abuse before the age of 15. A 2007 national prevalence survey in Swaziland found that approximately 1 in 3 females experienced some form of sexual violence as a child. Fewer studies exist on sexual violence against boys and some other International studies suggest that between 3% and 29% of men have experienced some form of sexual abuse during childhood”.<sup>8</sup>

## **1.2 Back ground of the problem**

SVAC includes acts or threats of such harm or suffering, coercion or arbitrary deprivation of liberty whether occurring in public or private life. It constitutes one of the most widespread human rights abuses and public health problems in the world today. Simultaneously, SVAC has deeper and broader social effects including negative social development of children in the households, break-up of the families, disintegration of social fabric of affected communities and the well being of society as a whole. SVAC occurs in many places and levels, such as in families, schools, religious institutions and in other aspects of community life.

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<sup>6</sup> Op.Cit. RuyanD,wattanC,IkedaR,Hassan,F,andRamiroL.

<sup>7</sup>Violence Against Children in Zanzibar Excerpt from a National Survey on Violence Against Children in Tanzania 2009 page 5

<sup>8</sup> Ibid

Globally, SVAC received great attention with the passage of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979.

The United Republic of Tanzania is the product of the union of two sovereign states called the United Republic of Zanzibar and the Republic of Tanganyika conducted on 26<sup>th</sup> April 1964. Both states by uniting and forming a new state have surrendered their treaty making power to the United Republic of Tanzania. But the concern of union matters are only which enumerated in the Articles of union and has been appended in the schedule of the constitution of the united republic of Tanzania of 1977.

The said Constitution provides clearly that all union and non-union matters of Mainland Tanzania shall be under the exclusive jurisdiction of the union Government and non-union matters for Zanzibar shall be under exclusive jurisdiction of Revolutionary Government of Zanzibar. Zanzibar is bound by all Conventions ratified by the Union Government. Each part of the United Republic of Tanzania has its own High court and that save for the decision of the High court of Zanzibar, on matters emanating from the Chief kadhi's Court, all appeals from the High Court of Zanzibar and the high court of Tanzania lies on the on the court of appeal of Tanzania which is the final appellate court

In 1989 The Convention on the right of child (CRC) was adopted and opened for signature ratification and accession by General Assembly resolution 44/25 of 20<sup>th</sup> November 1989. It entered into force on 2<sup>nd</sup> September 1990. Tanzania ratified the Convention on the Right of a Child in 1991, without reservation. In accordance with CRC vividly explains that each state ratifying or acceding to the convention after the depositing of thirtieth day.<sup>9</sup> It shows that on being ratified by the Union Government, Zanzibar is automatically bound.

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<sup>9</sup>Article 49 of CRC of 1989

The Convention on the Rights of the Child (CRC) states that, all children have the right to be protected against all forms of violence, exploitation and abuse including sexual abuse and sexual exploitation<sup>10</sup>. The United Nations Convention on the Rights of the Child (CRC) is an international treaty that legally obligates nations to protect children's rights. Articles 34 and 35 of the CRC require states to protect children from all forms of sexual exploitation and sexual abuse. This includes outlawing the coercion of a child to carry out sexual activity, the prostitution of children, and the exploitation of children in creating pornography. States are also required to prevent the abduction, sale, or trafficking of children.

Not only that but also the African Convention is a regional instrument that has include child protection from sexual abuse to the extent of torture, inhuman or degrading treatment. The gist has been enumerated under article 16 (1) and (2).

1. *“States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.*
2. *Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.”*

The effect of these provisions is that it gives additional accountability to combat SVAC, to avert and to act against it. The victims of the violence have the right to take the perpetrator of SVAC to the court of law. Not only that, also he or she have right to institute legal actions against the public officers who are responsible to handle the cases if they do not maintain his/her rights. Again, one after showing cause can institute private proceedings upon leave of court.

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<sup>10</sup>CRC Convention article 19

The promulgation of the Constitution therefore puts emphasis on accountability in the investigation and prosecution of SVAC cases.<sup>11</sup>

In Zanzibar, the concern with SVAC became the public agenda in the past decade in response to increasing sexual and other gender related crimes committed against children. The subsequent arrest and incarceration of one Bw. Kitangi who was long suspected of defiling and sodomizing young children provided an impetus for civil society organizations to deal with SVAC and GBV crimes in the local community.

Zanzibar Revolutionary Government has been taking different initiatives to curb the problem of sexual violence against children in Zanzibar. For example the establishment of The Children Act number 6 of 2011 was a step in promoting awareness concerning the international and national guidelines and laws on protection of children welfare.

Other initiatives include establishment of child protection unit under the department of social welfare, health service in different hospitals in Unguja and Pemba, strengthening and expanding suitable legal protection for children and legal consequences for offender. The government also continues to increase on present Gender and Children's Desk supports among the Tanzania Police Force nationally.

The establishment of the children court is on the whole a big step to on implementing the law of safeguarding and protecting children in Zanzibar; however, till to date, the society has been very reluctant in reporting cases concerning SVAC. Although the Government is performing its role to such a level in protecting children who are the most vulnerable. children, have however continued to suffer from different forms of maltreatment including sexual violence. On other hand, the cases of sexual abuse against children are reported in Sheha's offices, Police Stations, Ministry responsible for women and children, and non-governmental organizations dealing with children rights. Culprits of sexual violence against children have been

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<sup>11</sup>Dr.ruth Aura (2014) "Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities" <http://www.Kenyalaw.org/get/6283>

charged in Courts but ended with being set free for not have of proof to support allegations beyond reasonable doubt as required by the Criminal Procedure Act 2004, especially with the cases concerning with the children with disabilities and the younger ones. In most cases, the prosecution side fails to establish a case against the offenders which leads to charges being dismissed.

In 2009 the revolutionary government of Zanzibar carried out for the first time a national survey on the violence against children in Zanzibar the study was guided by a multi-sectoral Task force (MSTF) which was chaired by the Ministry of social Welfare, Youth women and children Development (MSWYWCD) and consisting of government ministries the police and legal system. The study was coordinated by United Nations Children's Fund (UNICEF) Tanzania Country Office, with technical guidance and assistance provided by Muhimbili University of Health and Allied Science and the Centres for Diseases Control and Prevention. The findings out of survey indicated that sexual violence is a significant problem that occurs at home, school and in communities.<sup>12</sup> This report provides the magnitude and nature of the violence experienced by children in Zanzibar. It highlights the particular difficulties of reporting and receiving services in cases of sexual violence and associated negative health consequences.

The consequences of sexual violence against children are debilitating and many such as risk of HIV and other sexually transmitted diseases, damage to reproductive organs. The psychological and social consequences are equally as devastating as the prevailing stigma as often leaves children isolated and increasingly vulnerable. The trauma a survivor experiences goes beyond her own suffering, also rendering great costs to her family and community.

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<sup>12</sup>Violence against children in Zanzibar Excerpt from a National Survey on Violence Against Children in Tanzania 2009 pg 17

### **1.3 Statement of the Problem:**

Significantly, Violence against children is not only against human right but also negative health and social impact on children's development. Many researches have been done and it shows that, sexual violence is very prevalent. It is also notable that revolutionary government have taken various measures to curb sexual violence against children; for example, The Zanzibar Government has taken several measures for the purpose of making that Convention part of Zanzibar legislation. Number of measures to protect children has been provided in several laws of Zanzibar, for example the introduction of bill of rights in the Constitution of Zanzibar 1984 as part of the children's protection rights in Zanzibar; the Children's Protection Act no.6 of 2011; and Penal Act 2004.

In other words, problem facing Zanzibar nowadays is how to make an enabling situation to translate commitment into action, in concert with real strategies to remove unrelenting sexual violence against children and recognize effectiveness of the law to curb sexual violence against children of both institutional and community level in the development of the country.

### **1.4 Hypotheses**

- i. Sexual violence against children in Zanzibar is very predominant.
- ii. The laws to curb sexual violence against children are ineffective.
- iii. The laws to curb sexual violence against children are poorly enforced
- iv. Other factors that also contributes to the predominance of sexual violence against children in Zanzibar.

## **1.5 Objectives of the Study.**

There is general objective and specific objectives.

### **1.5.1 General objective of the Study**

The main objective of the research is to analysis and examines the status and the effectiveness of the law to curb sexual violence against children in Zanzibar

### **1.5.2 Specific objectives include:**

1. To examine the predominance of sexual violence against children in Zanzibar.
2. To asses ineffectiveness of the laws in Zanzibar to curb sexual violence
3. To examine the law enforcement mechanism to curb sexual violence against children
4. To examine other factors that contributes to the predominance of sexual violence against children in Zanzibar.

## **1.6. Literature Review**

There are several writers, who have written about the issue of protection of children in different aspects. However, the gap still remains as on the effectiveness of measures to address the issue comprehensively. There are many reports concerning the protection of children's rights in Zanzibar with reference to sexual violence against children.

SVAC is a very predominant form of violence than other forms of violence. This is, however, not only in Zanzibar but even in other countries in the world despite various international and regional convections, and national legislations being enacted still the problem is persisting and increasing day after day.

The reporting by child victims is low. The 2011 National survey on the violence against children documented the prevalence of physical and sexual violence against children (1 in 20 females and 1 in 10 males experience sexual violence before the age of 18 years and 60% and 70% respectively experience physical violence). Significantly over 60% never told anyone about their experience and less than 15% received any support leaving perpetrators free to continue to abuse children<sup>13</sup>.

The GBV study established that High Court of Zanzibar prove the prominent occurrence of child sexual abuse Zanzibar. Records show that the children were being sexually assaulted on a regular basis. Victims of these incidents are children are of eight years up to sixteen years but many of them were twelve years. General the perpetrators of the crime are people very close to the children, in a care affiliation to the child like an uncle, a *madrasa* teacher, a neighbor, which may clarify the fact that it takes a while before a parent becomes aware of the crime being committed.<sup>14</sup> The gist also proves how SVAC in Zanzibar is predominant.

World Health Organization<sup>15</sup> states, “Action in schools is vital for reducing sexual and other forms of violence. In many countries a sexual relation between a teacher and a pupil is not a serious disciplinary offence and policies on sexual harassment in schools either do not exist or are not implemented. In recent years, though, some countries have introduced laws prohibiting sexual relations between teachers and pupils. Such measures are important in helping eradicate sexual harassment in schools”.

Actually it is not only the teachers in schools who commit sexual violence against children the study also found that even children among themselves with different ages commits the offence of sexual violence. For example there is one case where as a child of 17 years molested a child of 13 years.

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<sup>13</sup> Op. Cit. Violence against children in Tanzania pg8

<sup>14</sup> Salma Maulid and Usu Mallya Study on GBV prevalence in Zanzibar, Ministry of Labour, Youth Women and Children Development 2007 pg 13

<sup>15</sup> World Health Organization (2000) Geneva report, “World Report on Violence and Health (Chap 6 – Sexual Violence

“The child sexual abuse plaintiff’s attorney Thomas A. Cifarelli<sup>16</sup> has written that children involved in the legal system, particularly victims of sexual abuse and molestation should be afforded certain procedural safeguards to protect them from harassment during the legal process.”

National Institute of Drug Abuse<sup>17</sup> study found that "Among more than 1,400 adult females, childhood sexual abuse was associated with increased likelihood of drug dependence, alcohol dependence, and psychiatric disorders. The associations are expressed as odds ratios: for example, women who experienced congenital sexual abuse in childhood were 2.83 times more likely to suffer drug dependence as adults than were women who were not abused."

Joyce Mulama<sup>18</sup>, “in women and children face serious social and cultural barriers to legal redress. This is so because women and children are reluctant to use legal remedy as they do not believe that they are entitled to protection, they are afraid of additional violence from the perpetrator, they are pressured to avoid bringing shame upon their family or where the perpetrator is a family member, jailing the perpetrator may cut off the family’s economic support”.<sup>19</sup>

“Laird Hunter suggests<sup>20</sup> that people who use the legal system must be able to guide themselves through a process that they understand and, at appropriate places along the way, they are able to recognize that they have a legal right or responsibility, so as to enable them to exercise or assume it.” Legal literacy also involves the skill to know when a problem or conflict is a legal one and when a legal solution is available; recognize how to take the necessary action to avoid problems, and where this is not likely, how to assist themselves properly; know how and where to find information on the law, and be capable of finding information that is easy to get to them, know when and how to get appropriate legal aid; have confidence that the

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<sup>16</sup>Cifarelli, T.A.,*Shielding Minors*, Los Angeles Daily Journal, (October 10, 2001).

<sup>17</sup>Zickler, Patrick (April 2002). "Childhood Sex Abuse Increases Risk for Drug Dependence in Adult Women". NIDA Notes (National Institute of Drug Abuse) 17 (1): 5.

<sup>18</sup> Joyce Mulama, Courts far from a safe heaven, available <http://ipnews.net/news.asp?idnews=36828>

<sup>19</sup> Ibid

<sup>20</sup>“<http://www.johnhoward.ca/document/litcou/english/page05.htm#Definition> (accessed 13 February 2014)”.

legal system will provide a solution and realize the process clearly enough to observe that justice has been done.<sup>21</sup>

From the above it explains that understanding of the law helps in self awareness. in order to have law which is effective to curb the sexual violence against children then the society itself has to have knowledge of the law a to know their right and responsibility and also what law provide to protect them.

Dr. Ruth Aura<sup>22</sup> “argue that countries have dedicated themselves to avert and end violence by ratifying international conventions and declarations, thus admitting the seriousness of the problem. In spite of these efforts, violence against children is still uncontrolled, therefore the need to continuously conduct research to expose the hidden problem and propose strategies that sexual violence against children should be omitted, but also recommend how the survivors can be compensated and supported. States have a duty to promote and protect all human rights and fundamental freedoms of all citizens, and they must exercise due diligence to prevent, investigate and punish acts of violence against women and children. The state also has a duty to protect victims of any form of violence, a responsibility for which it ought to be held to account”.

Salma Maulid and Usu Mullya<sup>23</sup> were of the view that although existing laws relating sexual violence against children have some strong provisions, they are deficient in an enforcement mechanism to require institutional observance as envisaged under an assortment of international, regional and national instruments. Also in spite of the attendance of a forceful legislation, reports of sexual crimes are still high while the conviction rate for sexual crimes is low in Zanzibar. Significantly, legal frameworks remain ineffective because children right continue to be analysed within the religious background instead of being related to the legal context.

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<sup>21</sup><http://www.johnhoward.ca/document/litcou/english/page05.htm#Definition> (accessed 13 February 2014)”.

<sup>22</sup> Dr. Ruth Aura (2014) Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities, <http://www.Kenyalaw.org/get/6283> ,“ pg27”(accessed on 10 February 2015)

<sup>23</sup>Salma and Usu (2007) GBV Incidence and Responses in Zanzibar

Also despite strong laws most of national-level sexual violence and GBV response are inadequate that further warns that the survivors of abuse may be endangered during or after a legal procedure something that may affect their readiness to continue with the legal process. This is compounded by the reality noted that support service for victims of sexual violence are inexistent, insufficient or rejected.<sup>24</sup>

Kizito Makoye<sup>25</sup> Stated that: Asha Abdul, a TAMWA activist, attributes the increase in violent assaults against women to a number of issues, including the growing impunity of perpetrators “The police are the main obstacle; they do not do their jobs properly while handling rape cases. That is why most victims are not willing to report these incidents,” she says. As a result, many perpetrators are not even charged or investigated for their crimes. Cases are also dismissed on account of missing expert witnesses e.g. health personnel not attending court session to give their professional opinion and also poor prosecution.

According to the Evidence Act Cap.5 of 2004 a Witness attending to the court is compellable or it is mandatory but the experience shows that some of them failed to attend in court for different reasons and no action is taken against them thus why the study reveals that where the law is there, it is poorly enforced.

“In June 2008 in Zambia the issue of teacher-student sexual abuse and sexual assault was brought to the attention of the High Court of Zambia where a landmark case decision, with presiding Judge Philip Musonda, awarded 45million Zambian Kwacha (\$13,000 USD) to the plaintiff, a 13-year-old girl for sexual abuse and rape by her school teacher.

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<sup>24</sup> jullu (AI report 1997 )

<sup>25</sup> Kizito Makoye Zanzibar’s Rising Violence Against Women article of Thursday, February 18, 2016 The Guardian Gazette

This claim was brought against her teacher as a "person of authority" it was stated that, "had a moral superiority (responsibility) over his students".<sup>26</sup>

“In the Catholic sex abuse cases, various Roman Catholic Diocese in United States have paid out approximately \$1 billion settling hundreds of such lawsuits since the early 1990s. There have also been lawsuits involving the American Religious Right. Crimes have allegedly gone unreported and victims were pressured into silence.”<sup>27</sup>

The researcher found that even in Zanzibar the SVAC cases are not reported but they solve out of court of law by paying the victim or victim’s family some amount of money.

In the United States growing awareness of child sexual abuse has sparked an increasing number of civil lawsuits for monetary damages stemming from such incidents. Increased awareness of child sexual abuse has encouraged more victims to come forward, whereas in the past victims often kept their abuse secret. Some states have enacted specific laws lengthening the applicable statutes of limitations so as to allow victims of child sexual abuse to file suit sometimes years after they have reached the age of majority. Such lawsuits can be brought where a person or entity, such as a school, church or youth organization, was charged with supervising the child but failed to do so with child sexual abuse resulting.

UNICEF report 2001<sup>28</sup> it has explained another type of sexual violence against children thus molestation. It has been reported that young girls who leave their villages in Tanzania at the age of 12 or 13 are reported to most likely suffer physical and verbal abuse and occasionally molestation and rape by their employers. Child molestation is a criminal offence but still the practice is prevalent in Tanzania and Zanzibar.

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<sup>26</sup>"When A Girl Student Stands Up and Wins" <http://en.wikipedia.org>, 11, 2008(accessed on February 2014)

<sup>27</sup>"*The Church Child Sex Abuse Scandal Widens and Deepens*".

<sup>28</sup>UNICEF(2001) Analysis of the situation of Sexual Exploitation of children in the Eastern and Southern Africa Region.<http://www.unicef.org/events/yokohama/cse-east-southern-africadraft.html>.

There is a lack of DNA facilities that would assist in gathering forensic evidence in cases relate to rape, illegitimate children, defilement etc. It was recommended in one of the studies Ministry of Health and Social Welfare MoHSW that should procure equipment for conducting DNA tests in all major health facilities.<sup>29</sup>

After reviewing all above literatures the researcher found that these literatures confined only on explaining the poor legal redress of SVAC , however, they have failed to show the effectiveness of the laws in combating SVAC and the factors that contribute to increase sexual violence and poor legal redress which is a gap the researcher intend to show.

### **1.7 Significance of the Study.**

The study reveals the *lacunae* of the present laws towards protecting children against sexual violence and is also expected to draw recommendations for the Zanzibar Government, and community at large.

Likely, provides knowledge and encourage Zanzibar people to fight for the right of children and against sexual violence against children.

This research provide information that will be helpful in establishing National Policy Guidelines for Victims of sexual violence for medical professionals, police investigators, prosecutorial staff and institution concerning with social development, aiming at making a consistent measures for sexual violence cases.

Lastly it will be used as a reference material for the future researches in the similar field or related disciplines

### **1.8 Research Methodology**

The researcher applied the following methods to carry out the study; research design, study area, study population, sampling techniques, research instruments, data collection procedure and data analysis.

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<sup>29</sup> A myth or Reality(policy Brief No.3) Sexual Abuse in Zanzibar 2007

### **1.9 Type of the Study**

This study is a combination of both qualitative and quantitative methods. These methods were found to be useful for the purpose of collecting data.

A qualitative method was used by the researcher to collect detailed information regarding the study therefore various documents and web sites were reviewed, under this scope international and regional instruments and national laws, text books and journals were used as references.

The quantitative method was applied to gain insight into people's attitudes and opinions. Therefore sample was taken from population of the study and data collected was analyzed to provide a clear picture of the problem in hand.

### **1.10 Research Design**

The researcher employed a descriptive survey method; this is a method of collecting information by interviewing or administering a questionnaire to a sample of individuals. The researcher found this method to be suitable to this study for the collection of detailed description of the study within the three regions of Unguja.

### **1.11 Area of Study**

This study was carried out in Zanzibar. Unguja Island was selected as an area of the study; in fact the choice provided a clear picture and reality of island Data was gathered in three regions of Unguja namely Town and Western Urban Region, Southern and Northern Regions.

The researcher purposively selected Town and Western Urban region because most of the public offices from which the researcher got information were located in these regions. These are; the Department of social welfare, AG Chamber, DPP office , Non-Governmental Organization in Zanzibar like ZAFELA ,ZLS, ZLSC, law enforcement agencies (police).

The researcher used research tools interview guide and questionnaires to collect information from the respondents regards to the study topic on effectiveness of the law to curb sexual violence against children.

### **1.12 Sampling Techniques.**

The researcher used non probability sampling technique which is also known as deliberate or purposive or judgment sampling; it is a kind of sampling that gives a researcher an opportunity to select, on the base of her own judgment in each unit, the most useful representatives to be observed. In fact due to the limited period of time the researcher used this method of sampling deliberately selected samples in each unit as representative of the whole.

### **1.13 Data Collection Methods**

The researcher used both type of data collection; these are Primary and Secondary data collection methods.

Primary data was directly collected by the researcher from respondents, this data was gathered by using research instruments developed by the researcher these were questionnaires and interview guide.

Secondary the researcher got information through documentation analysis and electronic sources, here the researcher reviewed the relevant documents including international and regional instruments, laws, and policy and regulations applied in Zanzibar, the Zanzibar governmental report, journals of different authors and some useful website were used.

#### **1.14 Research instruments.**

The research instruments include the following questionnaires and interview schedules were developed by the researcher as tools in data collection.

Questionnaire is a research instrument that gathers data over a large sample.<sup>30</sup> Questionnaire was the main data collection instrument used to obtain information from the respondents.

The questionnaires comprised both close-ended and open ended questions. The researcher used Kiswahili language which is familiar and understandable by all respondents above all the language used was clear and straight forward which helped to reduce misinterpretation. The respondents were supposed to answer questions either on their own or by responding to an enumerator. Before the actual data collected, the questionnaires were pre-tested and improved accordingly.

This method was found to be convenient by the researcher because it minimized cost and save time due to the fact that the population was large and geographically scattered, apart from this, this method is said to be free from bias of the interviewer since answers are in respondents own perceptions.

Interview is a process of communication or interaction in which the subject or interviewee gives the needed information verbally in a face to face situation.<sup>31</sup> In fact these are questions asked orally to the interviewee by the researcher herself and under this study the researcher used semi-structured questions which were conducted in both English and Kiswahili.

This method was preferred in order to get a detailed understanding of the topic in hand since they are also found to be flexible as open and closed-ended questions were used. The fact is a face to face interview allowed the researcher to clarify ambiguous answers and when appropriate, seeks follow-up information.

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<sup>30</sup>.K.Kombo and D.Tromp Proposal and Thesis Writing 2006 Pauline Publication Nairobi. p 89

<sup>31</sup>Koul, B.N. (1996), *Research for Distance Education: Collection of Data*, Block 2, Indra Gandhi Open University, School of education, New Delhi India

Also interviews were structured to elicit information on a number of key areas including: the strengths and weaknesses of the current legal system, causes and prevalence of SVAC, treatment of victims of SVAC and those in need of protection and care; the role and functions of agents of law enforcers; and modes of dealing with SVAC cases.

### **1.15 Data Processing and Analysis**

The analysis of descriptive data used to assess the respondent's views and opinions of the study topic based on questionnaires and interview guide in order to meet objectives of the study. Data were analyzed by computation using Excel packages of Microsoft Office 1997-2003.

Quantitative data was compiled in the Microsoft Excel packages and making primary analysis. Percentage analysis was used to make comparison of the respondents between regions.

### **1.16 Study limitation**

There were number of limitations in this study. These are;

The researcher received warmly welcome from all offices she visited to these included both Governmental and Non- governmental offices and to the society, however due to different reasons there were some difficulties that the researcher faced with during the time of collecting data.

Firstly, on the part of interviews conducted to the officials the researcher failed to get the information within the period of time she had planned to the MSWYWCD officers due to their numbers which found to be inadequate compare with the department responsibilities these workers were found to be little busy however at last the researcher got the sample number of people she had attempted.

Also some people in the society whom their children were victims of SVAC did not want to discuss the issue when the researcher interviews them. Also it was bad timing as the research was done during the time of election Secondly, some of the respondents did not return back the questionnaire this affect the intended number of

respondents which actually reduced the probability nature of sampling this was, however, a small number which would not affect the reliability of the findings.

Lastly this study is costly, the researcher expended more money than her expectation budget for the photocopies of questionnaires and to pay research assistance, much credit were used in phone calls when the researcher seek appointment to the respondents and to ensure their accessibility likely much money were used for bus fare to reach different places which scattered within the two selected regions of North and South of Unguja island.

## CHAPTER TWO

### CONCEPTUAL FRAMEWORK

#### 2.1 Introduction

In this chapter the researcher explains the concept of child, violence against children and specific sexual violence against children as enshrined in some remarkable international and regional instruments and as observed by various authors for which this research has used for reference.

#### 2.2 Who is a Child?

Literally, a child means a person between babyhood and adolescence<sup>32</sup> but technically it depends on the context within which that person is referred to. In the CRC, Article 1 defined “a child as every human being below the age of 18 years unless the law applicable to the child, majority is attained earlier”<sup>33</sup> while in Zanzibar Children Act defines child as a person below the age of 18 years.<sup>34</sup>

According to Islam puberty (which normally occurs around 15years) is the age of capacity. So a female child may marry and have sexual intercourse at any time after puberty.

In the UN Convention on the right of a child, age of majority is eighteen years and this is general statute on the age of majority in many countries including Zanzibar. However the child might be defined differently in accordance to the law applied in a particular country. This means that failure to have a consistence definition of a child the law has failed to give full protection to the children. Thus according to general rule a child becomes an adult at the age of 18 years.<sup>35</sup> However under Islamic law puberty is (which normally occurs around 15 years) is the age of capacity. So a female child may marry and have sexual intercourse at any time after puberty.

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<sup>32</sup>A,S, Hornby, The progressive English dictionary, oxford university press, London,1992,pg 46

<sup>33</sup>Convention on child right article 1

<sup>34</sup>Section 2 of Zanzibar Children Act 2011

<sup>35</sup>Age of majority Decree (cap53)

Therefore there are various laws which provides for the minimum age of majority.

In OIC Convention on the rights of child in Islam does not go far away from the above definition of child, the Act provides that “a child means every human being who, according to the law applicable to him/her, attains maturity”.<sup>36</sup> As said before according to those definitions it depends much on the law applicable on a certain country to determine the age of majority.

It is the obligation of the state parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment including all kind of abuse on the basis of the status activities, expression. The best interest of a child is the primary consideration in all action concerning children, care and protection whether undertaken by public or court of law, administrative authorities or legislative bodies. And that way we can prove the effectiveness of the law to curb sexual violence against the children

### **2.3 Right of a Child**

Children are affected by many different types of abuse, including economic and sexual exploitation. International instruments in promoting and protecting the rights of children are built varied legal systems and cultural norms, highlighting universally agreed set of non negotiable standards. The basic standards are also known as human rights, these standards are founded on respect for dignity and worth of each individual, regardless of race, colour, gender language, religion opinions, origins, wealth, birth status or ability and therefore apply to every human being everywhere. These standard rights are both interdependent and indivisible, with these rights comes obligation on both governments and individuals not to infringe on the parallel rights of others.

The principle outlined in the international human right framework applies both to children and adults. Children are then mentioned explicitly in many human rights

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<sup>36</sup>Article 1 of OIC on Convention on the rights of children in islam .

## 2.4 Violence against Children

**VAC** is any harmful deed against child's will and that is based on socially ascribed differences between male and females. VAC includes acts or threats of such harm or suffering, force or arbitrary deprivation of freedom whether happening in public or private life. Both sexes can be victims but has a great impact on women and girls. It amount to one of the most common human rights abuses and public health problems in the world.

VAC has deeper and broader social effects including: negative social development of children in the households, disintegration of social structure of affected communities; and the well being of society as a whole. GBV occurs in many places and levels, such as in families, schools, religious institutions, work places and in other aspects of community life.

Effects of sexual abuse noted by is long term psychological effect such as chronic arousal, nightmares, emotional numbing, chronic pelvic pain, headaches, asthma, feelings of unworthiness and substance abuse. The non implementation of the law against the abusers puts the victims more at risk of violence.<sup>37</sup> Also VAC like sexual violence puts children at a direct risk to STI, HIV and AIDS and increased vulnerability to epidemic. It is also said that there is strong association between prior history of violence and HIV infection indicating that violence plays a role in women and children's HIV risk.<sup>38</sup> Damage to child's reproductive organs and bones.

**TAMWA's 1990 study** found that children violence and abuse is common problem and yet unrecognized in many countries.

The global school-based health survey 2006 recently found that between 20 and 65 per cent of school –aged children reported having been verbally or physically bullied. **WHO 2002**, estimates that 150 millions girls and 73 millions boys under 18 experience forced sexual intercourse or any other form of sexual violence.<sup>39</sup>

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<sup>37</sup> Rumashi S.F(2004) "Child Violence and Sexual Abuse in Tanzania", Tanzania Health Research pg33

<sup>38</sup> Horizon GBV study ,2001 page 9

<sup>39</sup> Maulid, S and Mallya, U. Op. Cit., p. 9

Studies like the study of united national on violence against children suggest that young children are at greatest risk of physical violence, while sexual violence predominantly affects those who have reached puberty or adolescence. Boys are at greater risk of physical violence while girls face greater risk of sexual violence, neglect and forced prostitution.<sup>40</sup>

Ultimately, the sheer scale of violence against children (girls) forces the question of what it will take to translate increasing recognition of the global prevalence of this abuse into meaningful, sustained, and widespread action not only at the highest levels but also locally.

## 2.5 Definition of Sexual Violence

“Sexual violence is any sexual act that is perpetrated against someone’s will. Sexual violence encompasses a range of offenses, including a completed non consensual sex act (i.e., rape), attempted non consensual sex acts, abusive sexual contact (i.e., unwanted touching), and non-contact sexual abuse (e.g., threatened sexual violence, exhibitionism, verbal sexual harassment).”<sup>41</sup>

“***Unwanted touching of respondent*** in which a perpetrator touched the respondent against his or her will in a sexual way, such as unwanted touching, kissing, grabbing, or fondling, but did not try to force him or her to have sexual intercourse.”<sup>42</sup>

“***Attempted unwanted intercourse*** in which a perpetrator tried to make the respondent have sexual intercourse when he or she did not want to, but the assailant did not succeed in doing so”.<sup>43</sup>

“***Physically forced intercourse*** in which a perpetrator physically forced the respondent to have sexual intercourse against his or her will.

***Coerced intercourse*** in which a perpetrator pressured or non-physically forced the respondent to have sexual intercourse against his or her will. For instance, the

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<sup>40</sup>Op. Cit. pg 5

<sup>41</sup>Violence against children in Tanzania: findings from national survey, 2009 pg 15.

<sup>42</sup>Ibid

<sup>43</sup>Ibid

respondent had unwanted sexual intercourse because he or she felt overwhelmed by continual arguments and pressure.”<sup>44</sup>

“Sex” or “Sexual Intercourse” is when a male’s penis enters someone else’s vagina or anus, however slight.<sup>45</sup>

**“Sexual Intercourse for Females** (as used when describing acts of sexual violence) - would include someone penetrating a female’s vagina or anus with their penis, hands, fingers, mouth, or other objects, or penetrating her mouth with their penis”.<sup>46</sup>

**“Sexual Intercourse for Males** (as used when describing acts of sexual violence) - would include someone penetrating a male’s anus with their penis, hands, fingers, mouth, or other objects, or penetrating his mouth with their penis. Sex can also include someone forcing the male’s penis into their mouth, vagina, or anus.”<sup>47</sup>

Although The Penal Act Zanzibar does not have a specific definition of sexual violence instead it provides for different forms of sexual violence crime such as rape, indecent assault, sexual abuse, acts of gross indecency between persons, grave sexual abuse and sexual harassment. But the law is enacted with the view to combating sexual violence .in Zanzibar penal act no.6 of 2004 part XV provides for offence against morality.

### **2.5.1 Child Sexual Abuse**

Laws against child sexual abuse differentiate from one country to another based on the local meaning of who is a child and what amount to child sexual abuse. Most countries in the world use some form of age of consent, with sexual contact with an underage individual being criminally penalized. As the age of consent to sexual activities differ from country to country, so too do definitions of child sexual abuse An adult's sexual intercourse with a minor below the legal age of consent may

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<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> Op. Cit. Violence against children in Tanzania: page 14

<sup>47</sup> Ibid pg15.

sometimes be referred to as statutory rape based on the code that any evident consent by a minor could not be considered legal consent.<sup>48</sup>

**Child abuse** means contravention of the right of the child which causes physical, moral, or emotional harm or suffering or other cruel or degrading punishment ,insults, discrimination, deliberate neglect sexual abuse, exploitative labor or any traditional practice prejudicial to health<sup>49</sup>

**Child sexual abuse** or **child molestation** is a form of child abuse in which an adult or older adolescent uses a child for sexual stimulation.<sup>50</sup> Forms of child sexual abuse include asking or pressuring a child to engage in sexual activities (regardless of the outcome), indecent exposure (of the genitals, female nipples, etc.) to a child with intent to gratify their own sexual desires or to intimidate or groom the child, physical sexual contact with a child, or using a child to produce child pornography<sup>51</sup>

**Child Marriage** is one of the main forms of child sexual abuse; UNICEF has stated that child marriage "represents perhaps the most prevalent form of sexual abuse and exploitation of girls"<sup>52</sup> and most of time this marriages happens by force thus children are forced to get marriage.

Also under the Zanzibar children act no.6 child marriage or forced marriage is one of exploitation of which exploitation lies in the meaning of trafficking the gist have been explained under section 2 of the children act as follows:

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<sup>48</sup>["Statutory Rape Known to Law Enforcement"](#) (PDF). U.S. Department of Justice - Office of Juvenile Justice and Delinquency Prevention. Retrieved 2008-03-24.

<sup>49</sup> Section 2 of The children's Act No.6 of 2011

<sup>50</sup>"[Child Sexual Abuse](#)". Medline Plus. U.S. National Library of Medicine.,2008-04-02."Guidelines for psychological evaluations in child protection matters.Committee on Professional Practice and Standards, APA Board of Professional Affairs". The American Psychologist **54** (8): 586–593. August 1999... **Abuse, sexual (child)**: generally defined as contacts between a child and an adult or other person significantly older or in a position of power or control over the child, where the child is being used for sexual stimulation of the adult or other person.

<sup>51</sup>Martin J, Anderson J, Romans S, Mullen P, O'Shea M (1993)."Asking about child sexual abuse: methodological implications of a two stage survey". Child Abuse & Neglect **17** (3): 383–92.

<sup>52</sup>[http://www.unicef.org/chinese/protection/files/Child\\_Marriage.pdf](http://www.unicef.org/chinese/protection/files/Child_Marriage.pdf)

*“Trafficking” in relation to a child means the recruitment, transportation, transfer, harbouring, adaptation or receipt of a child for the purpose of exploitation within or across the borders of Zanzibar, and “exploitation” includes, but not limit to*

- a) Prostitution or any form of sexual exploitation;*
- b) Forced labour or service, prohibited child labour or other economic exploitation;*
- c) Slavery or practises similar to slavery ,debt bondage or forced marriage;”*

The effects of child sexual abuse can include depression, post-traumatic stress disorder, anxiety, complex post-traumatic stress disorder, propensity to further victimization in adulthood, and physical injury to the child, among other problems. Sexual abuse by a family member is a form of incest and can result in more serious and long-term psychological trauma, especially in the case of parental incest.

The global prevalence of child sexual abuse has been estimated at 19.7% for females and 7.9% for males.<sup>53</sup> Most sexual abuse offenders are acquainted with their victims; approximately 30% are relatives of the child, most often brothers, fathers, uncles, or cousins; around 60% are other acquaintances, such as "friends" of the family, babysitters, or neighbours; strangers are the offenders in approximately 10% of child sexual abuse cases.<sup>54</sup> Most child sexual abuse is committed by men; studies on female child molesters show that women commit 14% to 40% of offenses reported against boys and 6% of offenses reported against girls.<sup>55</sup>

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<sup>53</sup>“Pereda, N., Guilera, G., Forns, M., & Gómez-Benito, J. (2009). "The prevalence of child sexual abuse in community and student samples: A meta-analysis". *Clinical Psychology Review* **29** (4): 328–338”.

<sup>54</sup>“Julia Whealin, Ph.D. (2007-05-22). "Child Sexual Abuse".National Center for Post Traumatic Stress Disorder, US Department of Veterans Affairs”.

<sup>55</sup>“Dube SR, Anda RF, Whitfield CL, et al. (June 2005). "Long-term consequences of childhood sexual abuse by gender of victim". *American Journal of Preventive Medicine* **28** (5): 430–438”.

*pedophileis* commonly applied indiscriminately to anyone who sexually abuses a child,<sup>56</sup> but child sexual offenders are not pedophiles unless they have a strong sexual interest in prepubescent children.<sup>57</sup> Under the law, *child sexual abuse* is an umbrella term describing criminal and civil offenses in which an adult engages in sexual activity with a minor or exploits a minor for the purpose of sexual gratification.<sup>58</sup> The American Psychiatric Association states that "children cannot consent to sexual activity with adults", and condemns any such action by an adult: "An adult who engages in sexual activity with a child is performing a criminal and immoral act which never can be considered normal or socially acceptable behaviour."<sup>59</sup>

A study funded by the USA **National Institute of Drug Abuse** found that "Among more than 1,400 adult females, childhood sexual abuse was associated with increased likelihood of drug dependence, alcohol dependence, and psychiatric disorders. The associations are expressed as odds ratios: for example, women who experienced congenital sexual abuse in childhood were 2.83 times more likely to suffer drug dependence as adults than were women who were not abused."<sup>60</sup>

A well-documented, long-term negative effect is the repeated or additional victimization in adolescence and adulthood. A causal relationship has been found between childhood sexual abuse and various adult psychopathologies, including crime and suicide, in addition to alcoholism and drug abuse. Males who were sexually abused as children more frequently appear in the criminal justice system

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<sup>56</sup>“Ames, M. Ashley; Houston, David A. (1990). "Legal, social, and biological definitions of pedophilia". *Archives of Sexual Behavior* **19** (4)”:

<sup>57</sup>“Blaney, Paul H.; Millon, Theodore (2009). *Oxford Textbook of Psychopathology* (Oxford Series in Clinical Psychology) (2nd ed.). Oxford University Press, USA. p. 528. Some cases of child molestation, especially those involving incest, are committed in the absence of any identifiable deviant erotic age preference”

<sup>58</sup>“The Sexual Exploitation of Children, Chart 1: Definitions of Terms Associated With the Sexual Exploitation (SEC) and Commercial Sexual Exploitation of Children (CSEC) (p. 4), University of Pennsylvania Center for Youth Policy Studies, U.S. National Institute of Justice, August 2001.”

<sup>59</sup>“APA Letter to the Honorable Rep. DeLay (R-Tx)” (Press release). American Psychological Association. June 9, 1999. Archived from the original on October 10, 1999. Retrieved 2009-03-08.”

<sup>60</sup>Zickler, Patrick (April 2002). "Childhood Sex Abuse Increases Risk for Drug Dependence in Adult Women". *NIDA Notes* (National Institute of Drug Abuse) **17** (1): 5”.

than in a clinical mental health setting.<sup>61</sup> A study comparing middle-aged women who were abused as children with non-abused counterparts found significantly higher health care costs for the former.<sup>62</sup> Intergenerational effects have been noted, with the children of victims of child sexual abuse exhibiting more conduct problems, peer problems, and emotional problems than their peers.

South Africa criminal law (sexual offences ) Amendment Act 2006 tries to define “sexual violation to exclude sexual penetration but to include any act that causes :a) direct or indirect contact between the –(i) genital organs or anus of one person or, in the case of a female , her breasts, and any part of the body of another person or an animal, or object, including any object resembling or representing the genital organs or anus of a person or an animal; (ii) mouth of one person and –the genital organs or anus of another person or in the case of female ,her breasts; the mouth of another person any other part of the body of another person other than genital organ or anus of than person or, in the case of female her breast which could be used in an act of sexual penetration ;or cause sexual arousal or stimulation; or be sexually aroused or stimulated thereby; or any object resembling the genital organs or anus of a person the mouth of the complainant and the genital organ or anus of an animal.

## **2.6 Concept of Legal Illiteracy**

“in recent years, the focus of literacy has changed from an emphasis on levels of schooling to a focus on functional skills. Most lay people are not alive to the realities of the legal environment. Knowledge of the law is power and helps in self realization. “Laird Hunter suggests that people who use the legal system must be able to guide themselves through a process that they understand and at appropriate places along the way, they are able to recognize that they have a legal right or responsibility, so as to enable them to exercise or assume it.”<sup>63</sup> Legal literacy also involves the ability to recognize when a problem or conflict is a legal one and when

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<sup>61</sup>“Understanding child sexual abuse: education, prevention, and recovery.American Psychological Association Retrieved 30 October 2012”

<sup>62</sup>Arnow BA (2004). *"Relationships between childhood maltreatment, adult health and psychiatric outcomes, and medical utilization"*.*The Journal of Clinical Psychiatry*. 65 Suppl 12: 10–15.

<sup>63</sup><http://www.johnhoward.ca/document/litcou/english/page05.htm#Definition> (accessed 13 February 2014).

a legal solution is available; know how to take the necessary action to avoid problems, and where this is not possible, how to help themselves appropriately; know how and where to find information on the law and be able to find information that is accessible to them, know when and how to obtain suitable legal assistance; have confidence that the legal system will provide a remedy, and understand the process clearly enough to perceive that justice has been done.<sup>64</sup>

Where people are ignorant to their rights, lead a good breeding ground for all forms of injustices. Children become the biggest victims as they are more vulnerable to abuse. It is through awareness of the laws and the objectives served by them that children can obtain the benefits that law seeks to offer them. Taking into consideration the present scenario, issues like empowerment of women and making them aware of their rights and the rights of their children, which they can use to fight injustices, become very difficult in the absence of legal literacy. Lack of awareness and education are the main causes for injustices being meted out to the marginalized populations, especially children.<sup>65</sup>

“Legal literacy programmes have also been credited with helping women and to understand the link between their rights and other aspects of their lives, and in demonstrating that cost-effective initiatives can be undertaken to help women and children obtain those rights”.<sup>66</sup>

In this study the researcher is therefore of a mind in supporting this concept in the cause of analysis and recommendations to be made regarding the study topic “effectiveness of the law to curb sexual violence against children”.

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<sup>64</sup>Op. Cit. *Arnou BA (2004)*.

<sup>65</sup>The 7th CEDAW Periodic Report (n 5 above) para 250.

<sup>66</sup>Op. Cit Dr. Ruth Aura pg26”

## CHAPTER THREE

### LEGAL FRAMEWORK

#### 3.1 International and Regional Legal Framework that Curb Sexual Violence against Children

The matter and scenery of SVAC can be so cruel that it is a clear and unquestionable violation of the basic human rights of the victim. SVAC in its innumerable forms is a manifestation of violation against children of their rights, including the right to life, the right to liberty and security of the person, the right to be free from torture and the right to health.<sup>67</sup>

“Violence has been acknowledged as being an express violation of human rights particularly the rights of women and children. In this regard Romany posits that:”<sup>68</sup>

*“To assert that a particular social claim is a human right is to vest it emotionally and morally with an especially high order of legitimacy. Violence is an egregious form of certain infringement of the core and basic notions of civility and citizenship. Violence assaults life, dignity, and personal integrity. It transgresses norms of peaceful co-existence”.*

“International law is an instrument used by states to resolve global issues, that not only those which are affecting the state parties in their ‘national’ capacity, but also individual issues bordering on express or implicit violation of human rights.”<sup>69</sup> The surplus of international legal instruments and statements dealing with violence against children propose that international bodies and states have identified violence

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<sup>67</sup> Op. Cit. Dr. Ruth Aura p4

<sup>68</sup> C Romany ‘State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’ in R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 85. See also RB Bilder ‘Rethinking International Human Rights: Some Basic Question’ (1969) 1969 *Wisconsin Law Review* 174.

<sup>69</sup> B Meyersfeld *Domestic Violence and International Law* (2010) 32.

as a global rights anxiety. The accomplishment of the international instruments is to recognize SVAC as a human rights violation”.<sup>70</sup>

Therefore internationally and regionally they have series of instruments, meant to protect children against Sexual violence.<sup>71</sup> This in turn has aptly helped recognize SVAC as a human right violation. Of great importance is the principle of due diligence as enounced under international law principles.

The due diligence principle provides a standard of care used to determine whether a state has complied with its international obligations.<sup>72</sup> In several international conventions and accords, there has now been explicit acknowledgment of the state’s responsibility for human rights violations by private actors in both the public and private spheres. A state has both negative and positive obligations towards her citizens. One of the duties is to refrain from acts of violence against children as well as to prevent and protect children from violence. Similarly, a state has a duty to punish perpetrators and compensate victims of violence. The state may be held responsible under international law for failure to provide reasonable and adequate measures to prevent or address children’s rights violations.

Sexual violence against children are covered under international humanitarian, criminal human rights law including the international conventions on the rights of a child

Various international nominative and regional instrument and declarations have recognize the violence against children thus include sexual violence and as a form of violation of human rights. The widespread inclusion of the prohibition of the sexual violence against children in International and Regional treaties and declarations, it is the recognition and the application by the international tribunals as well as

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<sup>70</sup> Egede,Hephzibah.”shroudedgeder and reproductive issue in child welfaer and protection proceeding”Dennig Law journal,2011

<sup>71</sup> See for instance Universal Declaration of Human Rights (adopted 10 December 1948),convention on the child right of 1989

<sup>72</sup> “Black’s Law dictionary defines due diligence as diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. BA Garner *Black’s Law Dictionary* (9th ed) (2009) 488”.

prevalence in the national legislation of the majority of states, indicate that these prohibitions represent a consensus in the international community about the normative force of prohibition of sexual violence against children.

This chapter examines how the international and regional community laws have addressed and dealt with to curb sexual violence against children.

### **3.2 International Instruments**

#### **3.3 The International Convention on the Rights of the Child, 1989**

The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by the General Assembly resolution number 44/25 of 20<sup>th</sup> November 1989 which entered into force in the 2<sup>nd</sup> September 1990, in accordance with CRC vividly explains that “each state ratifying or acceding to the convention after the depositing of thirtieth day “. <sup>73</sup> Therefore Tanzania ratified that convention since 1991 without any reservation and started to implement the convention in the day to day activities for the protection of the children’s rights and its welfare.

The United Nations Convention on the Rights of the Child (CRC) is an international treaty that legally obligates nations to protect children's rights. Articles 34 and 35 of the CRC require states to protect children from all forms of sexual exploitation and sexual abuse. This includes outlawing the coercion of a child to perform sexual activity, the prostitution of children and the exploitation of children in creating pornography. States are also required to prevent the abduction, sale, or trafficking of children. <sup>74</sup> As of December 2014, 195 countries have ratified the Convention, including every member of the United Nations except the United States and South Sudan. <sup>75</sup>

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<sup>73</sup> Article 49 of CRC of 1989

<sup>74</sup> Ibid, article 34, article 35, article 3

<sup>75</sup> [\*Weekly Press Conference on the Progress of the Government\*](#). Dayniile. 28 December 2014. Retrieved 28 December 2014.

The state parties to the present convention, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and alienable rights of all members of the family that include children is the foundation of freedom, justices and peace in the world. Bearing in mind that the people of United Nation have in the charter reaffirmed their faith in the fundamental human rights and in their dignity for the purpose of promoting social progress and better standard of their life.<sup>76</sup>

Actually the convention on the right of child is the universal tool of the right of child, and requires state parties to take all suitable legislative, administrative, social and educational actions to guard the child from all forms of sexual abuse. Article 19 states that:-

*“1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

*2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”*

The right covered in this convention which is designed to promote security and welfare of a child may also be used effectively to curb sexual violence against children.

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<sup>76</sup>CRC Convention of 1989

### **3.3.1 Best Interest of a child**

The convention of the children rights involves the best interest of a child in the protection of a child's right, it is contained in article 3(1) and at the national level, the principle of the best interest of a child have great importance in the effectiveness of law in various matters regarding children and particularly to curb sexual violence against children.

At international level, the principle of the best interest of the child was embodied in UN Declaration of the right of child of 1959.<sup>77</sup> The Declaration proclaim that the child shall enjoy special protection and shall be given opportunities and facilities by the law and other means to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and in conditions of freedom and dignity.

Best interest of a child has also being captured in The Zanzibar Children Act no.6 of 2011, section 3 states as follows:

*“3 This Act shall interpreted and applied so that in all matters concerning the care, protection and well being of the child, the best interests of the child concerned shall be the paramount consideration”*

Also the factors to be taken into consideration in determining the best interests of the child has been explained under the same act.<sup>78</sup>

### **3.3.2 The Universal Declaration of Human Rights 1948**

The Universal Declaration of human right (UDHR) 1948 set out a common standard of achievement for all peoples and all nations. It advocates for several of such rights which includes: equality of all human being in dignity and right, right to life liberty and security of all persons, freedom from servitude, torture, inhuman or degrading treatment.

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<sup>77</sup> Article 2 and article 7 of UN General Assembly Resolution 1386 (xiv) of 20 November, 1997.

<sup>78</sup> Section 4 of The children act no.6 of 2011

In the Universal Declaration of Human Right, the united nations has proclaimed that the childhood is entitled to special care and assistance, convinced that fundamental group of the society and the natural environment for the growth and well-being of all its members and particularly children should be afforded the necessary protection and assistance so that it can full assume its responsibility within the community.

On other hand recognizing that the child for the full and harmonious development of his or her personality should grow up in an atmosphere of happiness, love, respect and understanding. Considering that the child should be prepared to live in individual life in society and brought up of ideals proclaimed in particular in the United Nations, with the spirit of peace, dignity, tolerance freedom, equality and solidarity.

The extension of particular care of a child has been stated in the Geneva Declaration of the Rights of a Child of 1924 and in the declaration of the rights of a child adopted by the general assembly on 20<sup>th</sup> November 1959 and recognized in the universal declaration of human rights in the international convention on economic, social and cultural Rights under statute and relevant instrument of specialized agencies and international organization concern with the welfare of children. In the declaration of children's rights, "the child by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection. All these among the other provisions, may positively be used effectively to curb sexual violence against children.

### **3.3.3 The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984**

The convention was a sequel to the Declaration on Protection of All Persons being subjected to torture and other cruel, inhuman or degrading treatment or punishment 1975. Under the convention the term torture is defined as any act by which serves pain or suffering whether physical or mental intentionally inflicted for a person for such purpose as obtaining from him or third person or third person information or a confession, punishing him for an Act he or a third person has committed or is

suspect of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, where such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity.<sup>79</sup>

Torture is a crime under international law. It can never be an instrument to fight terror, for torture is an instrument for terror. Those who conceive of or authorize any form of torture and cruel, inhuman or degrading treatment and those who commit such acts should not go unpunished. Individuals must never render to another state if there is any danger that doing so may subject them to torture.

State parties are under obligation to take effective legislative, administrative, judicial or other measures to prevent acts of torture in their jurisdiction. State of war or threat of war, internal political instability or any other public emergency shall not be invoked as justification of torture.<sup>80</sup>

Although this instrument does not clearly refer to the sexual violence against children has been construed as falling under the exclusion against “inhuman or degrading treatment” in the ICCPR State parties are required to take positive action to provide outcome to the enumerated rights. It is therefore follows that protection against torture under the Convention Against Torture may well be engaged to child sexual abuse in the circumstance where torture appears.

### **3.3.4 Convention on Persons with Disabilities, 2008**

The purpose of this Convention is provided for under article 1 of the Convention. These are to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedom by all persons including children with disabilities and to promote respect for their inherent dignity.

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<sup>79</sup> Article 1 of The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

<sup>80</sup> UN Secretary-General, message on Human Right Day 10<sup>th</sup> December 2005 *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or punishment 1984*

By definition persons with disability include those who have long-term physical, mental, intellectual or sensory impairments which in the interaction with various barriers may hinder their full and effective participation in the society on an equal basis with others.

Under the convention the states parties are under duty to discharge general and specific obligation. The general obligation is to ensure and promote the full realization of all human rights and fundamental freedom of all people with disabilities without discrimination of any kind on the basis of disability.

“As means to the discharging this general obligation the following are among specific provision to be observed in order to curb sexual violence against children with disability are<sup>81</sup> :-

To adopt all appropriate legislative, administrative, and other measures for the implantation of the right recognized in the present Convention.

To take all appropriative measures, including legislation to modify or abolish existing laws regulations customs and practice that constitute discrimination and abuse against persons with disabilities.

To take into account the protection and promotion of human rights of the persons with disabilities in all policies and programs

To take all appropriate measures to eliminate discrimination and abuse on all basis of disability by any person, organization or, private enterprises

To promote the training of professionals and staff working with people with disabilities in the rights recognized in this Convention so as to better provide the assistance and service guaranteed by those rights.

In violence and gender perspectives, the Convention provides to:-<sup>82</sup>

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<sup>81</sup> Article 4 of Convention on persons with disabilities

Recognize that women and girls with disabilities are often with greater risk, both within and without the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.<sup>83</sup>

Recognize that children with disability should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by State parties to the Convention on the Rights of the Child.<sup>84</sup>

Emphasize the need to incorporate a gender perspectives in all form to promote the full enjoyment of human right and fundamental freedoms for the people with disability and

Highlight the fact that the majority of the people with disabilities live in the condition of poverty and recognizing the critical need to address the negative impact of poverty on the people with disabilities”.<sup>85</sup>

These principles spelt out by the convention also provide some standards relevant for combating violence including sexual violence against children in any society.

### **3.3.5 Convention on Domestic Workers, 2011**

These Convention was adopted in Geneva On 100<sup>th</sup> (ILC) international labor conference session on 16<sup>th</sup> June 2011 and entered into force in 05 September 2013 the convention is dealing with the domestic workers and according to the convention it explains that domestic worker is any person who engage in domestic work within an employment relationship;<sup>86</sup> Actually in this Convention on domestic workers sexual violence against children was not tackled directly but somehow it was. It is well known that there are domestic workers who are under the age of 18 thus they are still minor (children) in Tanzania and even in other countries,

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<sup>82</sup> ibid

<sup>83</sup> Ibid

<sup>84</sup>ibid. preamble r

<sup>85</sup> Ibid preamble t

<sup>86</sup>Article 1 of the convention on domestic workers

The Convention states that the state parties shall take measures to ensure that work performed by the domestic workers who are under age of 18 and above the minimum age of employment does not deprive them of compulsory education, or interfere with opportunities to participate in further education.<sup>87</sup> And so due to the fact that even children are engaged in domestic works, the convention has provide for the effective protection to curb all forms violence and abuse thus include sexual abuse of the child who engaged in domestic works.<sup>88</sup>

Like many other convention this one also has taken step to curb SVAC although its effectiveness will depend on the state parties.

### **3.4 The Regional Instruments**

At a regional level, certain regional treaties also tackle violence against children and lay a positive responsibility on the states parties to take actions to care of children against violence.

#### **3.4.1 The African Charter on the Rights and Welfare of the Child, 1990**

The declaration on the rights and the welfare of the African child adopted by the Assembly of Heads of the states and Government of the Organization of Africa Unity, at its sixteenth ordinary session in Monrovia, Liberia from 17<sup>th</sup> to 20<sup>th</sup> July, 1979 recognized the need to take appropriate measures to promote and protect the rights and welfare of African child.<sup>89</sup>

The declaration reaffirm to the principles of the rights and welfare of the children contained in the declaration, convention and other instrument of the Organization of African Unity and in the United Nations and in particular in the united nations on the

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<sup>87</sup>Op. Cit article 2

<sup>88</sup>ibid. article 5

<sup>89</sup> Preamble of African charter 1990

rights of child and the OAU Heads of the State and Government declaration on the rights and welfare of the African child.<sup>90</sup>

This charter deals specifically with children. The situation in most African countries children remains critical due to unique factors of their social economic, cultural, traditional and development circumstances, armed conflicts exploitation and hunger and on account of child's physical and mental immaturity he/she needs special guard and care.

Also in providing the effectiveness of the charter it recognize that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security.<sup>91</sup>

Therefore whenever anything arose affecting the child, caused by person, authority, such as sexual abuse the child's welfare shall be considered first. Not only that but also the convention has include child protection from sexual abuse under the scope of torture, inhuman or degrading treatment. The gist has been enumerated under article 16 (1) and (2) as follows:-

3. *“States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.”*
4. *“Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral*

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<sup>90</sup> Op. Cit African charter 1990

<sup>91</sup> *ibid*

*investigation, treatment, and follow-up of instances of child abuse and neglect”.*<sup>92</sup>

Like other instrument these also place the states on duty to take affirmative action to curb and eradicate violence including by means of legislative, social and educational means.

### **3.4.2 Zanzibar legal framework relating to the effectiveness of the law to curb sexual violence against children.**

#### **Introduction**

SVAC constitute a violation of the individual’s basic rights and fundamental freedoms. It result into breach of the basic right and fundamental freedom such as the victim’s right to dignity, mental and physical integrity, liberty and security of the person as well as his or her right to be free from inhuman or degrading treatment and torture other rights which are violated by sexual violence include the individual’s right to health and in some cases to life.

In Zanzibar, international and regional treaties are not part of the domestic laws and therefore cannot directly be invoked in our courts. It is therefore upon the authorities in Zanzibar to identify international principle and standards that are desirable for the application in Zanzibar and take initiatives (with necessary modification) to domesticate those principles and the standards into our laws so that the courts could apply. This kind of consideration has been already recognized by the Zanzibar constitution 1984. Under section 10 (9) the constitution provides that all governments organ and its servant shall adhere and follow the international treaties on human rights.

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<sup>92</sup>Article 16 of African charter on the rights and welfare of child.

### 3.4.3 The children are right in the Constitution of Zanzibar 1984.

The constitution of Zanzibar is the fundamental law, and all laws should be consisted with it. The human rights include the children rights are found in Chapter III of the constitution of 1984.<sup>93</sup> These general rights apply to all people without discrimination and these rights reflect the implementation of the Convention on Rights of Child (CRC). However the constitution does not mention sexual violence against children but the constitution provides that every person is entitled to recognition and respect for his dignity.<sup>94</sup>

Also the constitution of Zanzibar of 1984 provides that “every person has the right to live and the protection of his life by the society in accordance with the law.”<sup>95</sup> The section provide as follows

*“13 (1) every person has right to the preservation of his life*

*(2) every person has the right to live and to the protection of his life by the society accordance with the law.*

*(3) it is prohibited for a person to be tortured, inhumanly punished or to be given punishment which are grading and humiliating.”* this gist has been also enumerated under CRC article 6 in which every state has an obligation to recognize that every child has the inherit right to life and protection in the law and other rights under the category of the rights to personal freedom, right to privacy band personal security, right to freedom of movement and right of expression. A part from safeguard such right, the constitution allows the victim of the human rights violation to seek redress in the court. Section 24 of the constitution provide that a person alleging that any provision in chapter III of the constitution or in any law concerning his right or duty owed to him has been, is being or likely to be violated by any person anywhere in Zanzibar may institute proceedings for redress in the high court and the High Court shall have the power to declare and order compensation to any concern.<sup>96</sup>

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<sup>93</sup>Article 11 up to 25 of Zanzibar constitution

<sup>94</sup>Ibid, Article 11

<sup>95</sup>Ibid article 13

<sup>96</sup> Article 24 of the Zanzibar constitution of 1984

Apart from having a long list of human right and duties guaranteed in the constitution there is no provisions in the Zanzibar constitution 1984 which explicitly impose a duty to curb sexual violence but such specific provision are found in other national legislation.

## **LEGISLATIVE PREVENTION OF SEXUAL VIOLENCE IN ZANZIBAR.**

### **3.4.4 The Penal Act No. 6 Of 2004**

The Zanzibar Penal Act does not have a specific definition of sexual violence instead it provide for different forms of sexual violence crimes such as rape, indecent assault, sexual abuse, Acts of gross indecency between persons, grave sexual abuse and sexual harassment.

In the Zanzibar legislation, there are exist number of provisions which protect children and other people from sexual violence. Among the laws enacted with the view to curb sexual violence in Zanzibar is penal Act 2004. Part xv of the Act provides for offences against morality. The most famous of the offence against morality is rape.

#### **i RAPE**

Section 125 of the penal Act contains a list which if committed amounts of rape. The section starts by providing that it is an offence for a man to rape a girl or woman. Thus in order to commit an offence of rape, amounts must have sexual intercourse with a girl or woman under any of the following circumstances

- Not being his wife, or being his wife is lawfully separated from him without her consenting to it at the time of the sexual intercourse
- With her consent where the consent has been obtained by the use of force, threat, or intimidation or by putting her in fear of death or hurt or while she is in lawfully detention.
- With her consent when her consent has been obtained at the time when she was unsound mind or was in a state of intoxication induced by alcohol or any drugs, matters or things, administered to her by the man or other person

- With her consent when the man knows that he is not her husband and that her consent is given because she has been made to believe that he is another man to whom she is, or believes herself to be lawfully married.
- With or without her consent when she is less than 18 years of age, unless the woman is his wife who is not legally separated from the man.

The definition of rape found under section 125(e) of penal act 2004 has shortcoming in combating the sexual violence against child especial child girl. Under this provision, no rape is committed by a husband by having sexual intercourse with a wife girl who has not reach 18 years. This has been caused by lack of minimum age for marriage in our laws apart from being sexual violence against child girl it also against the Islamic principles under which a girl may be married at whatever age but does not participate in the provision of conjugal right until she attains puberty.

The variation of structure of legal system such as application of Islamic laws in the Kadhi's Court as well as social or cultural barriers and limited financial resources is deemed to present particular challenges to the effectiveness of the laws to curb sexual violence against children in Zanzibar. Laws enacted by the Zanzibar House of Representative are to some extent influenced by Islamic law. For instance, it has been noted above section 125 (2) (e) of the penal Act of 2004 that a husband cannot be guilty for a forcibly having sexual intercourse with a wife unless there are lawfully separated. Consent here is deemed to be obtained by a woman on entering to a contract of marriage.<sup>97</sup> Under the sexual offences (special provision) Act of 1998, there was a provision that if a husband have sexual intercourse with a wife who has not attain puberty he was committing an offence of defilement of a girl. And on conviction he was liable to imprisonment for life the amendment of SOSPA in the penal Act no. 6 of 2004 removed the condition of a married girl attaining puberty and is now construed that a man married a girl who has not attain puberty and having sexual intercourse with her is no longer offence, this is serious omission of law. If that act is done by a man even though is a lawfully husband will consist of sexual violence against child wife.

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<sup>97</sup> A statement by the Deputy Chief Kadhi in an interview conducted in his office on 5<sup>th</sup> October 2015

To make the law effectiveness in order to curb sexual violence against children the researcher suggests reinstating the repealed provision section 125 (2) and amend by SOSPA 1998 which stated that:

*“Provide that it shall not be an offence for a man carnally to know or attempt to the carnal knowledge of his wife if she has attained puberty”*

Furthermore Zanzibar laws are silence on the minimum age of marriage. The house of representative have a good reason of not enacting a law proving for minimum age for marriage on ground of being in conflict with Islamic teachings, whereby the parent is duty bound to find a suitable fiancé for his child as soon as they attain adulthood. This statement is supported by Hadith which states:

*“It has been ordained in torah that a father, whose daughter reaches age of twelve and due to delay in marriage indulges in wrong behaviour, will bear the responsibility for the sin committed by his daughter”*

Most of cases this happens to girl’s children only. Although the above hadith should be interpreted with bearing in mind another Narration. Where by Holy Prophet said:

*“One who is bestowed with children by Almighty Allah, he should give them good names, education and training and get them married when they gain adulthood. In case they are not married and digress from the path of virtue, the father will be held responsible for that.”(Baihaqi.)<sup>98</sup>*

Although the first narration insists on marriage of a girl upon attaining 12 years the second one has insisted on such a marriage but in concern with other priorities. The first priority is to give her good name, followed by good education, training and finally getting married. With this scenario, if provision of Education Acts no 6 of 1982 are fully implemented the minimum age for marriage would not be an issue.

**a. Carnal knowledge in the definition of rape.**

The definition of carnal knowledge being the constituent of rape is too shallow. Section 124 of the penal Act 2004 provides:” Wherever upon the trial for any

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<sup>98</sup> See Akhlaque Husain (ed.)”Muslim Parents, their Rights and Duties”, Saed International (REED), New Delhi, 1993, p.135.

offence punishable under this part it may be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon the proof of penetration only.”

The researcher here is on the view that in order the law to be effective in curbing sexual violence which is very predominate in Zanzibar the Carnal knowledge should not be limited to penetration of male sexual organ into the vagina or anus, but should be extended to penetration of any object so as to circumvent those offenders who prove before courts that they are impotent and they cannot commit sexual intercourse. That is to say, sexual penetration should include ‘Act which causes penetration to any extent whatsoever by - (a)genital organ of one person into or beyond the anus, mouth or genital organ of another person; or (b) any object including any part of the body of an animal, High Court Petition of 2012. Or other part of the body of one person, into or beyond the anus or genital organ of another; or (c) the anus or genital organs into or beyond the mouth of another person,<sup>99</sup> these will curb the loop hole that can be used by the offender of sexual violence to escape sanction.

#### **b. Compensation for rape victims.**

Knowing the sexual violence impairs physical and mental health of the victim, section 126 (1) of the penal Act 2004 provides compensation to victims of rape cases. The court apart from sentencing the offender to imprisonment and fine shall order the offender to compensate the victims for the physical or psychological injuries suffered. However, the gap is observed in execution of order of compensation. Most of the offenders of rape own property and cannot afford to compensate the victim while serving their time in prison.

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<sup>99</sup>South Africa criminal law (sexual offences ) Amendment Act 2006 tries to define “sexual violation to exclude sexual penetration but to include any act that causes :a) direct or indirect contact between the –(i) genital organs or anus of one person or, in the case of a female , her breasts, and any part of the body of another person or an animal, or object, including any object resembling or representing the genital organs or anus of a person or an animal; (ii)mouth of one person and –the genital organs or anus of another person or in the case of female ,her breasts; the mouth of another person any other part of the body of another person other than genital organ or anus of than person or, in the case of female her breast which could be used in an act of sexual penetration ;or cause sexual arousal or stimulation; or be sexually aroused or stimulated thereby; or any object resembling the genital organs or anus of a person the mouth of the complainant and the genital organ or anus of an animal.

The Government should have a special scheme under the ministry responsible for women and children for compensating the victims for physical and psychological injuries as well as counselling services. Under the scheme mechanism should be devised for the government to recover the fund direct from the offender or, with court order, from the attachment and sales of the offender's property offender's property. In principle, the perpetrator must pay to the victim" the full amount of the victim's losses" which include any cost incurred by the victim for-“(a) medical services relating to physical, psychiatric, or psychological care; (b) physical and occupational therapy or rehabilitation; (c) necessary transportation, temporary housing and child care expenses; (d) loss of income; (e) attorney's fees plus any costs incurred in obtaining a civil protection order; and (f) any other losses suffered by the victims.

Generally difficult issues that often come to mind are (i) whether and how compensation should be made more readily available; (ii) the apportionment of damages in cases where charge of rape also involves an element of another crime, for example, where the victims dies and the action is brought by third parties; and how to protect the victim's privacy and confidentiality during the civil trial, also come to mind.

### **c. Marrying the victim as Defence to Rape**

It sometimes happens that there is evidence that someone has committed rape, and that he is subject to criminal charge for rape. However, instead of charging the culprit with rape, he is allowed or compelled to marry the victim. This kind of defence to rape is not provided in our laws though institutions concerned with enforcement of laws has been applying it in compromising the victims and offenders. In principle, this is inconsistent to the government's efforts to combat sexual violence crimes due to this act the research has observed the poor enforcement of the law.

This defence that allows the rapist to run away from the rape charge by marrying the victim should be strictly discouraged by the law. This is necessary to avoid inducement to rape, and subject the victim to further marital rapes; also, to avoid

sending bad message that marital rapes are exonerated. Laws should not tolerate impunity for rape if the perpetrator marries the victim.

#### **d. Informal Compensation as Defence to Rape**

As indicated above, payment of compensation to the victim may be part of penalty element for rape. Some shehas have been acting as mediators of rape cases by resolving that the perpetrator High Court Petition of 2012. Should compensate the victim for certain amount of money. One such case happened at kizimkazi Zanzibar in September 2008 where a three years girl was seriously defiled and sodomized. When a case was reported before a sheha it was resolved that the offender to informal compensation.<sup>100</sup> The researcher observed that the law should strictly be prohibited and should not be the substitute for Imprisonment terms of penalty.

#### **ii Sexual abuse**

The penal also provide for the grave sexual abuse. Section 156 of the Act provides that if a person who for sexual gratification does any Act by the use of his or her private parts or any other part of human body or any instrument on an orifice or part of the body of any other person being an Act which does not amount to rape is guilty of grave sexual abuse. However, in order for such an offence to be committed, it must have been done under any of the following situation:

- In the absence of consent of that other person;
- If that other person consented but that consent has been given by use of force, threat, or intimidation or putting that other person in fear of death or infliction of hurt or while that other person was in unlawful detention;
- If the consent was given while that other person was of unsound mind or was in state of the intoxication induced by alcohol or any drug.

A penalty of the grave sexual abuse is imprisonments for a period between 14 and 30 years this provision provides that for the purpose fully inspiring in victim the belief that if will sexually assaulted the law protect him or her.

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<sup>100</sup>The story from the respondent interviewed at fuoni Zanzibar on Satday 25 April 2015

The above definition of grave sexual abuse resemble that “sexual violation “used in south Africa Criminal law (sexual offence) Amendment Act <sup>101</sup> although it does not cover a situation where an animal is used to the Act of grave sexual abuse.

### **iii Other sexual offence**

Other sexual abuse covered under penal Act 2004 includes the defilement of idiots and imbeciles, procuring for prostitution, sexual harassment.

As sexual harassment section 158 of the penal Act 2004 provides for the list of acts which amount to sexual harassment. These are

- Intentionally assaults or by use of criminal force, sexually harasses another person, or by the use of words or action, cause sexual annoyance or harassment.
- With the intention insult the modesty of any person uttering any word, making any sound of gesture, or exhibiting organ any object including whether male or female, intending that such word or sound shall be heard, or that the gesture or object shall be seen by the person or introducing upon the privacy of the person;
- Unwelcome sexual advances or action used by a person in authority in a working place or any other place;

The best practice that can be observed in the Zanzibar Penal Act is that most offences such as rape, acts of gross indecency between persons, grave sexual abuse and sexual harassment, carry provisions that allow courts to order compensation to victims for damages they suffer. However, other offences against morality such as attempted rape, abduction, indecent assault, defilement of boys, defilement of idiots

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<sup>101</sup>South Africa criminal law (sexual offences ) Amendment Act 2006 tries to define “sexual violation to exclude sexual penetration but to include any act any act that causes :a) direct or indirect contact between the –(i) genital organs or anus of one person or, in the case of a female , her breasts, and any part of the body of another person or an animal, or object, including any object resembling or representing the genital organs or anus of a person or an animal; (ii)mouth of one person and –the genital organs or anus of another person or in the case of female ,her breasts; the mouth of another person any other part of the body of another person other than genital organ or anus of than person or, in the case of female her breast which could be used in an act of sexual penetration ;or cause sexual arousal or stimulation; or be sexually aroused or stimulated thereby; or any object resembling the genital organs or anus of a person the mouth of the complainant and the genital organ or anus of an animal.

and imbeciles, procuring defilement, detention of women in brothel, unnatural offence, acts of lesbianism and sexual exploitation of children, leave the victims of sexual violence without any legal remedy. It is therefore recommended that all victims of sexual violence be entitled to compensation for physical and psychological injury they suffer.

### **Other Statutory Provisions Relevant to Sexual Violence**

#### **3.4.4.1 The Criminal Procedures Act 2004**

##### ***i. Hearing Sexual Violence Cases in Camera and lack of Rape shield Laws.***

The Act provides for procedures to be followed in criminal cases.

As to evidentiary procedures, victims of sexual violence encounter a number of challenges when they testify about the crime perpetrated against them. Generally, the Criminal Procedure Act 2004 requires that hearing of cases be made in public. There are however some instances such as juvenile cases where the court is compelled to try cases in camera these is where the perpetrator is a child. In other particular circumstances the court has discretion to hear cases in camera.

As most victims of rape and sexual assault are women, gender bias and societal stigma may affect perceptions of credibility. It is therefore recommended that certain mechanisms should be in place to defend complainants in sexual assault cases. These mechanisms include in camera hearings and privacy precautions, standards for assumption that may be drawn from complainant's testimony or lack of testimony, standards for consideration of evidence that may be submitted, rape shield laws that prevent the introduction of complainant's sexual history into testimony,<sup>102</sup> procedural requirements related to timing in bringing a charge of sexual offences, and guarantees of timing in the context of the conduct of the trial.

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<sup>102</sup> In Kenya's Sexual Offences Act 2006 a rape shield provision is provided and states: "No evidence as to any previous sexual experience or conduct of any person against or in connection with whom any offence of a sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no question regarding such sexual conduct shall be put to such person, the accused or any other witness at the proceedings pending before a court, unless the court has granted leave to adduce such evidence or to put such question." The Statute requires the court to grant such leave if the evidence or

*ii. Delay of Reporting Events of Sexual Violence and Having a particular day in a week to Examine Victims of Sexual Violence*

Another setback is failure of the prosecution to prove most sexual violence cases beyond reasonable doubt as required by the Criminal Procedure Act 2004. Where a sexual offence is committed, the matter needs to be reported to police immediately. The police officers are duty bound to conduct investigation and to institute a charge against the offender in court. Most rape cases and some other cases of sexual assaults are committed in private and there are usually no witnesses to provide direct evidence to corroborate the victim's allegations. Courts have therefore to rely on circumstantial evidence such as medical reports, which show evidence of sexual intercourse. This is only helpful if the victim is examined immediately following the rape.

The practice in Zanzibar is that rape victims are examined at Mnazi Mmoja Hospital on a particular day within a week. This hampers investigation process since the testimony of the Medical Officer will only show bruises and the statement that the sexual part of the victim has been entered by a blunt object, while the issue is whether the accused is the one who committed the offence or not.

The requirement of examining the victim immediately following the rape is neither known to most victims nor police officials who receive complaints at Police counter. It is therefore common for them to clean victims thereby spoiling evidence. This problem is intensified by delay of reporting the matter to police, leading to failure of the medical officer's report to support conviction.<sup>103</sup>

Public should be made aware of the importance of reporting sexual violence cases to police promptly and Police in return should take necessary measure to ensure

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questioning relates to specific instance of sexual activity relevant to a fact in issue, or is likely to rebut evidence previously adduced by the prosecution, or is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue, or is substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy, or is fundamental to the accused's defence.

<sup>103</sup> Given the stigma that surrounds sexual assaults offences and the fact that most offenders are relatives of the victims, the issue is first discussed in clan level. If it is to be reported (most of them are not), it may then be reported to police after a week during which time, there will be no swab on the sexual part of the victim left to support evidence.

victims are attended by medical officers as soon as possible. There is also a need to develop the respective National Policy Guidelines for Victims of Sexual Offences for medical professionals, police investigators, prosecutorial staff, and staff of the department of Social Development aiming at creating standardizing procedures for sexual violence cases.

### *iii. Need to have Private Criminal Investigation Agency*

The task of investigation of offences is vested to the Government through its agencies. Section 74 of the Criminal Procedure Act 2004 provides that investigation of offence committed under any law shall be conducted by any of the following:

- The police if the law does not mention specific investigator for such offence;
- An officer authorized under any law to conduct investigation in respect of a particular offence; and
- An officer authorized by the Director of public Prosecution.

There is no provision to allow private criminal investigation. There is therefore a need for our law to have provision which allow private criminal investigation to relieve such investigating agencies from heavy burden of criminal investigation. Private investigation will also allow victims or relatives to conduct own investigation where and when they have little or no faith with the police or public investigation.

### **DNA Test**

Apart from ignorance of the requirement of immediate examination, unavailability of fund and high costs of conducting DNA test is another problem which hampers availability of evidence of sexual assault cases in Zanzibar. According to Police Officials,<sup>104</sup> Police CID has insufficient fund to conduct DNA test.

The mechanisms to make DNA test readily available should be put in place.

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<sup>104</sup> Statement of OCD and RCO of Police in three regions of Zanzibar in a round table discussion held at Zanzibar Legal Service Centre on 9<sup>th</sup>. August 2008.

#### **3.4.4.2 The Children's Act NO. 6 OF 2011**

The children Act of 2011 has been enacted to provide for the right of protection and the best interest of a child. This Act also defines forms of sexual violence; provision 2 of the Act has defined child abuse that includes sexual abuse and is contravention of the right of a child.

Another form of sexual violence against the child is sexual exploitation and prostitution of which was put under the relation of trafficking of a child also the child pornography has been explained in the Act as one of the sexual violence but the Act was silent on explaining the concern of law to anyone who commits such offences it just simply define.

Provision 10 (6) provides that a child in respect of whom an offence of sexual abuse has been allegedly committed shall have a right to have medically examined immediately after reporting the alleged commission of such an offence to the police .

The Act has provided for the punishment imprisonment of not less than fifteen years for the perpetrator of sexual abuse against child.

The research found that there are ineffective provisions in this Act in combating sexual violence against children, for example under provision 18 (2) states that this Act shall not affect the jurisdiction of kadhi's court as set out in section 6 of the kadhi's court Act no. 3 of 1985 to determine questions of Muslim law relating to personal status and marriage. Under this ground is where many perpetrators uses the loop hole on escaping the punishment of the law and also gives the society reasons to infringe other laws and rights of children.

#### **3.5 Conclusion.**

To sum up it is revealed that the study topic is a global trend and emphasizes has been put to provisions that call for the needs of effective laws procedures and mechanism to curb sexual violence against children.

The Zanzibar legal framework undertaken this international commitment; as manifested under 1984 Zanzibar constitution concurrently with country's long time vision for the human right therefore under the same basis the provisions of law concerning sexual violence assume that international human right as well convention on children right demands.

However due to the researcher observation as she reviews the laws and basing on the research findings it can be said that the law is ineffective implemented in curbing sexual violence against children in Zanzibar the next chapter is going to provide the details of the study.

## CHAPTER FOUR

### FINDINGS AND ANALYSIS

#### 4.1 Introduction

The findings of this study reveal the three set of research hypothesis that this study is required to reply in relation to the study; the effectiveness of the law to curb sexual violence against children in Zanzibar.

The researcher in this chapter presents data collected in the period between October 2015 to February 2016 from institutions engaged with children who are victims of Sexual violence in Unguja, data were collected from two regions, namely Southern and Northern Region

#### 1.2. Total number of respondents from institutions dealing with children matters.

The researcher distributed 110 (100%) questionnaires to different institutions, mainly police, Ministry of Health and Social Welfare (MoHSW), DPP, Attorney General Chamber and NGO's which constituted the study population. However the number of the questionnaires which were returned was 83 which are equal to 95% of the total number. This is because some of respondent the lost the questioners and some were absent at time of collecting the questioners.

**Table 4.1** Gender issue

Answer	Number of respondents	Percentage
Male	39	34.8
Female	73	65.2
Total	112	100

The study findings show that 65% among the respondents were female and the remaining 35% were male.

**Table 4.2** Knowledge of the Provisions of Sexual Abuse.

<b>Answer</b>	<b>Number of respondents</b>	<b>Percentage</b>
Primary	8	7.2
Secondary	52	46
University	52	46
Total	112	100

As to the question whether respondents are familiar with the provisions of Zanzibar Act concerning sexual offences, the findings shows that, 46% of the respondents had knowledge of the provisions of the Act while 46% declared not to be conversant with the provisions of the Act that concerning with children sexual abuse; 7.2% or the respondents gave no response.

This result implies that the community is less familiar with the sexual abuse law (Acts); some of the respondents argue that, as the Act is written in English, this makes it difficult for them to understand it except for the children Act which has been translated in Kiswahili.

It emerged from the findings that majority of the respondents who agreed that they are conversant with the provisions of the Act concerning sexual violence against children possessed university education and others are the leaders of these organizations who work closely with the Ministry labour empowerment youth women and children, contrary to those who answered negatively. Those who did not respond appeared to be normal members in the society and possessed secondary and primary education.

**Table 4.3:** Knowledge of the respondents on the provisions of the sexual violence against children

Answer	Number of respondents	Percentage
Yes	52	46.4
No	52	46.4
No answer	8	7.2
Total	112	100

*Source: Own Findings.*

The results summary presented in Table 4.1 shows that the status of men participation in fighting or reporting cases concerning sexual violence against children which is in fact low and differs so largely to the number of female. This actually contradicts the global target where everyone have a vital role in fighting to curb sexual violence against children is essential to achieve effective law. The researcher observed that the unsatisfactory number of men participation is caused by the ignorance.

#### 4.3 Understanding of the forms of SVAC

**Table 4.4** Understanding of the forms of SVAC

Meaning of sexual violence	Number of respondent	Percentage
Rape	50	39.5
Sexual harassment	30	20.8
sodomy	20	8.3
Children marriage	12	6.2
total	112	100

*Source: owns findings*

#### 4.4 Whether sexual violence against children in Zanzibar is very predominance

Rape was the highly mentioned as the first form of sexual violence respondents understood, followed by sexual harassment, sodomy, child marriage and no respond. However, the respondents were not able to mention the act of sexual violence rather than the form.

In trying to probe their level of understanding as to a whether SVAC is as criminal or civil case (64.2%) of respondents said they treated SVAC case as criminal while (35.8%) treated SVAC as both criminal and civil case. A different understanding of

these issues clear indication of lack of inconsistency and systematic exposure among and across a wide spectrum of staff within the institution. This reinforced further on the way they failed to articulate the key element that are normally used to define SVAC where respondent understanding was limited to incidences cases or acts to constitute SVAC

The most common form of sexual violence experienced by both females and males before the age of 18 was sexual touching (16.0% and 8.7%, respectively), followed by attempted sexual intercourse (14.6% and 6.3%, respectively), which includes situations where the perpetrator attempted sexual intercourse but the act was not completed. Notably, 5.5% of females and 2.2% of males reported experiencing physically forced sex during childhood. Approximately 9% of children in Zanzibar reported being married before the age of 18. Most of these females reported marrying either when they were at 16 to 17 years old 65.3%. Minority of males however reported ever being married prior to the age of 18.

Despite the existence of a strong legislation, reports sexual crimes, is still high whereas the conviction rates for sexual crimes remain low Zanzibar. The study found that 40% of sexual offense trials failed due to lacking of evidence.<sup>105</sup>

In relation to this study, the findings of the study by the Tanzania Media Women's Association (TAMWA) show that rape, early pregnancies and child marriages are rising at an alarming rate in Zanzibar with 996 cases reported between 2012/13 as compared to the 398 in 2011. TAMWA's board member Gladness Munuo tells IPS that despite significant effort by rights activists and international donors to raise awareness about gender-based violence in Zanzibar, incidents have increased.<sup>106</sup>

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<sup>105</sup> Daniel Monseberg (2009) (ed) Concerned African Scholars "sexual and gender based violence in Africa" Bulletin N°83 — Fall

<sup>106</sup> "The outcome of our research has proved beyond a doubt that violence against women is still rampant in Zanzibar." -- Gladness Munuo, TAMWA

*“The outcome of our research has proved beyond a doubt that violence against women and children is still rampant in Zanzibar,”* she says.<sup>107</sup> Also the study finds that Statistics from the Rape Crisis Intervention Centre’s show an average of at least one case of gender-based violence, including rape, is reported daily in Zanzibar.

#### **4.5 Whether the laws to curb sexual violence against children are effective**

This study was also designed to elicit as on how effective was the laws concerning sexual violence against children in Zanzibar. The findings of this study revealed that more than 31% of informants working in institutions dealing with GBV which include sexual violence, reported to use the Penal Act in matters concerning SVAC. Consequent it was revealed by interviewers that the bench in Zanzibar use their judgment more eagerly than the law when handling SVAC offences as illustrated in the following case:

*“A 17 year old girl was raped by her mother’s lover. The magistrate issued a lower sentence because he established that prior to the rape; the girl was already sexually active albeit not with the rapist. He was doubly prejudiced when, at the time of the trial, he found she was pregnant with another man’s child. He also admits taking into consideration the fact that the rapist was known to the household. Because he could not bear sending a 27 year old man to prison for raping a promiscuous girl, he handed a sentence of 7 years”!*<sup>108</sup>

As stated in the previous chapter that the definition of rape found under section 125 (e) and 125(2) (e) of Penal Act 2004 has shortcoming in combating the sexual violence against children especially girl child. Under this provision, no rape is committed by a husband by having sexual intercourse with a wife who has not reached 18 years. This has been caused by lack of minimum age for marriage in our laws apart from being sexual violence against girl child it also against the Islamic

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<sup>107</sup> Ibid

<sup>108</sup> Op. Cit.Daniel Monseberg (ed) pg12

principles under which a girl may be married at whatever age but does not participate in the provision of conjugal right until she attains puberty.

The research found in Zanzibar that there are 66% of the early pregnancies and that child marriages increase. Most of girl children (65.3%) are reported marrying either when they were at 16 up to the age of 17. But Very few boys in reported ever being married prior to the age of 18.

Also the definition of carnal knowledge being the constituent of rape is too shallow. Section 124 of the penal Act 2004 provides that: *"Wherever upon the trial for any offence punishable under this part it may be necessary to prove the actual emission of the seed in order to constitute a carnal knowledge but the carnal knowledge shall be deemed complete upon the prove of penetration only"*.

The researcher found that the law is ineffective in curbing sexual violence. The meaning of sex is very limited of the male penetration and the research is on the view that it should not be limited to penetration of male sexual organ into the vagina or anus but should be extended to penetration of any object like artificial sex organs That is to say, sexual penetration should include 'act which causes penetration to any extent whatsoever by (a) genital organ of one person into or beyond the anus, mouth or genital organ of another person; or (b) any object including any part of the body of an animal, or other part of the body of one person, into or beyond the anus or genital organ of another; or (c) the anus or genital organs into or beyond the mouth of another person'<sup>109</sup>

#### **4.6 Whether the laws to curb sexual violence against children are poorly enforced**

Court procedures are generally not adapted to children, and children do not always understand the proceedings. The children Act requires that a child should be assisted by the welfare officer in the court proceedings but the study finds that most children do not have access to welfare officers to assist them during the court proceedings.

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<sup>109</sup> Op.Cit.South Africa criminal law

Here the researcher observed that although the law needs the social welfare officer to assist children in the court proceeding but this is not what is being done and this proved poorly enforcement of the law because it may lead to the infringement of the child's right.

The researcher also found that child victim and witness of sexual abuse do not generally receive a child friendly or sensitive response from the justice system, thus child victims are sometimes re-victimized by the process. Actually there are no facilities to guarantee that the child victim and witness give evidence in camera as provided by the Children Act<sup>110</sup> and also the Evidence Decree requires any evidence provided by the children to be corroborated as the child seems to be incompetent witness. The researcher tried to find whether the institution dealing with SVAC such as police has necessary skills needed to handle and manage SVAC cases. Responding to the question as to whether there should be different procedures in interviewing children (84.3%) of respondents said there should be a special procedure for interviewing a man and woman while (16.7%) said there is no need for such procedure of those who prefer to having different procedures for children.

“However, the recent case of *C.K.(A Child) Through Ripples International As Her Guardian And Next Friend) & 11 Others v. Commissioner Of Police/Inspector General Of The National Police Service & 3 Others*.<sup>111</sup> where the High Court made a finding that the police's failure to effectively enforce Section 8 of the Sexual Offences Act, 2006 infringed upon the petitioners right to equal protection and benefit of the law contrary to Article 27(1) of the Constitution of Kenya, 2010 was a step forward in the right direction. In addition, the court observed that by failing to enforce existing defilement laws the police contributed to development of a culture of tolerance for pervasive sexual violence against girl children and impunity. This decision informs the crux of this article and is therefore the point of departure.”<sup>112</sup>

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<sup>110</sup>Section 43(b) of the children Act 2011

<sup>111</sup>[2013] eKLR.

<sup>112</sup> Ibid

Actually Zanzibar obtains the same position that is sometimes the police fails to effectively enforce the provisions of the law.

Furthermore the study found that weak prosecution of SV related cases, especially offences of a sexual nature begins from the arrests and writing up charges. As it is police officers and the DPP seem to be mishandle the law, they are 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 as to 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. Up to 55% of the respondents indicated 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, 25% suggest that there is an urgent need to strengthen the capacities of prosecutors in drawing charges and prosecuting sexual crimes.

It is important to review is the practice of law enforcement functionaries in how they handle sexual assault cases. Many cases fail for the lack of strong evidence to make the charges stick beyond a reasonable doubt.

In a number of cases, charges against the accused are dropped because the court finds them based on the evidence the accused has been wrongly charged. In a few cases the charges are amended often from a more serious charge of rape to a less serious charge of indecent assault. For example, in “*R vs. Khalifa Hassan Kaita Criminal Case No. 49 of 2005, High Court of Zanzibar (unreported)*” the charge sheet was amended to read indecent assault even though sex had clearly happened for fear that a rape charge would not stand”. Another case which was poorly handled was “*R vs. Amton Rafiel Saimon Criminal Case No.113 of 2002 Regional Court of Zanzibar*”

(*unreported*) the accused was charged of rape but court ruled he was charged under a wrong section and he must have been charged of defamation.”<sup>113</sup>

In a similar view, the researcher found from interviewer, that poor investigation had exposed sexual abuse victims (rape victims) and made them more vulnerable to social stereotypes. In some cases, witnesses have refrained from providing evidence for fear of being isolated by their communities

The respondents were on the view that the courts should adopt the approach of different countries such as Kenya in protecting the right of children victims as follows:

“The Kenyan courts have recently adopted this approach in protecting the rights of women as was observed in *C.K. (A Child) & 11 others vs. The Commissioner of Police & 2 others*.<sup>114</sup> where the petitioners had sought the assistance of the court to declare that the effect of the respondents, that is the police, failure to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement violated the petitioners' fundamental rights and freedoms. The court in agreeing with the petitioners held that:”

“Having considered the evidence in the petitioners' affidavit and the petition herein, the relevant articles in the Constitution of Kenya, 2010, the general rules of international law, treaty or convention ratified by Kenya and other related and relevant laws applicable in Kenya, I am satisfied that the petitioners have proved their petition and that the failure on part of the respondents to conduct prompt, effective, proper and professional investigations into the petitioners complaints of defilement and other forms of sexual violence infringes on the petitioners fundamental rights and freedoms, under Articles 21 (1), 21 (3), 27, 28, 29, 48, 50 (1) and 53 (1) (d) of the Constitution of Kenya, 2010.”<sup>115</sup>

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<sup>113</sup> Op. Cit. Daniel Monseberg(ed)

<sup>114</sup> High Court Petition of 2012.

<sup>115</sup> Ibid as above High Court Petition of 2012.

While this case provided a positive starting point in terms of protecting the rights of and children against sexual violence, also the study finds that delays of cases concerning sexual violence are common, many parents and survivors may be led to believe that it is not worth the trouble to subject themselves through another degrading process. The longer the case takes the greater the possibility of key evidence to be lost or forgotten.

The researcher finds that many as 56% of the respondent interviewed do not think that sexual violence laws have helped to reduce sexual violence against children while 34% feel that the law help somehow while 10% thinks it helps a lot to reduce sexual violence furthermore 38% of respondent interviewed felt that respective institution follows the law while 52% felt there are weaknesses in applying the law.

Also the researcher found that the procedural provisions that can assist in the struggle against sexual violence are ineffective to curb sexual violence. For example the cases need to be investigated, handled and prosecuted with the confidence of the victim or the family victims but the laws of Zanzibar does not provide for the private investigations, these are kind of gap that need to be filled with effective provision of law in order to curb SVAC

Additionally, researcher found that, court prosecutors still required verification to prove rape even though the legal standard is only proof of penetration. One female magistrate interviewed justified the importance of corroboration for those who alleged sexual violence.<sup>116</sup> *“If there is no corroboration”*, she explained, *“Men will be imprisoned on vendetta”*. The interviewer explain that in some instance sometimes these perpetrator do not use force in committing the sexual offence against child during the time of penetration instead they use type of fabricant applying to a child sexual organ and this prevents the child from bruises.

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<sup>116</sup> Op.Cit. Daniel Monseberg(ed) pg12

#### **4.7 Other factors that contribute to the predominance of sexual violence against children in Zanzibar**

The researcher found that there are limited numbers of centres and facilities that can provide medical attention and forensic examination. Victims often live far from medical facilities and even further from those facilities that can carry out forensic examination that can be used in investigations and trials

#### **POOR COLLABORATIONS**

As stated earlier in the previous chapter of this study that the cases of sexual abuse against children are reported in shehas offices, Police Stations, Ministry responsible for women and children, and non-governmental organizations dealing with children rights. Culprits of sexual violence against children have been charged in Courts but ended with being set free for lack of evidence to support charges beyond reasonable doubt as required by the Criminal Procedure Act 2004 especially with the cases concerning with the children. In most cases, the prosecution side fails to establish a case to answer against the perpetrator. This is due to ineffective corroboration among police officers, health service providers, court magistrate and prosecutors as required by the law. There are also weak linkages between the justice system and the child protection system and other support services. This results in children not being referred to existing services that could assist them to recover. In order assess the governance and accountability of institutional such as courts and police in enforcement of the law.

#### **CORRUPTION**

“Concerns of corruption were universally voiced that hinders the legal process against dealing properly with the accused of violence.<sup>117</sup> Community attitudes are partly to blame since most prefer to deal with “whom they know” to either curve or speed up the legal or judicial process, inviting corrupt elements to take advantage of a population that is mostly are ignorant in legal issues.

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<sup>117</sup>Op.Cit. Daniel Monseberg(ed) pg13.

Survivors and victims of violence who are unable ‘to buy’ their justice are usually negotiating by law enforcement officials keen to maximize profits from the misfortunes of others. Ethical considerations have little bearing on their professions”.<sup>118</sup>

### **Pf3**

“In practice, no case of sexual assault is entertained in the absence of a Police Form Three (PF3). The requirement to present a PF3 in all GBV cases is problematic and more so when it involves a sexual crime. Foremost, in a human resource strained health sector their admissibility requirement such as to be filled by a designated medical officer, is hard to realize. For instance, it is hard to find the caliber of medical officer empowered to fill the form in most peripheral public health facilities. Also, the actual form is unsatisfactory for recording sexual crimes in detail. The size of the form, roughly one third of an A4 paper, does not motivate health officials to include additional information or diagrams which may assist to elaborate the injury. Likewise, the options to fill out the form are limited to superficial injuries and not other types of injuries”.<sup>119</sup> Actually the pf3 form is necessary filled immediately as the victim gets treated while waiting for further investigations.

### **COURT DELAYS**

“However, reviewed cases strongly suggest that the legal process may actually deter victims and their families from seeking redress through the courts. After suffering a traumatic experience it is not uncommon for families and survivors to wait for months, if not years before the investigation is concluded and the case for sexual assault is heard to conclusion before a competent and impartial court of law. Since delays are common, many parents and survivors may be led to believe that it is not worth the trouble to subject them through another degrading process. The longer the case takes the greater the possibility of key evidence to be lost or forgotten. Unreasonable delays led one parent to complain on record over the stalling of his child’s case which remained pending because the prosecutor was on study leave.

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<sup>118</sup> Ibid

<sup>119</sup> Op.Cit. Daniel Monseberg(ed)

Assigning a new prosecutor would mean starting fresh. The parent challenged this practice as denying the wronged child justice”.<sup>120</sup>

## **POVERTY**

The study found out that poverty also contributes a lot in sexual abuse against child in Zanzibar for example during the interview with one respondent explains that her granddaughter was sexually abused by a man of around 45 to 50 years old who by the time he was her expected son-in law thus he was expecting to marry the mother of the victim child who was 4 years by the time. The respondent explains that she used to send her granddaughter to borrow or get some money from that man due to the hardship of life the grandmother hoped that the expect son-in law may help them and of course he helped them but used that opportunity to abuse the child.<sup>121</sup>

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<sup>120</sup> ibid

<sup>121</sup> Story from respondent at kwa Mchina zanzibar

## **CHAPTER FIVE**

### **SUMMARY, CONCLUSION AND RECOMMENDATION**

#### **5.1 Summary**

Sexual Violence against children is human rights violence and is a challenge in the world. SVAC occurs in families, schools, religious institutions, workplaces and in other aspects of community life. Sexual offences are covered under international humanitarian, criminal and human rights laws. However, due to shortcoming of most domestic laws implementation of the same becomes difficult. The Constitution of Zanzibar 1984 as well as the Constitution of The United Republic of Tanzania 1977 guarantee rights and equality of all peoples but some social practices and legal limitations curtail or take away such rights.

The term “sexual violence” is not defined under the law, instead the laws provide for instances or forms of sexual violence. Some conducts that are serious sexual such as marital rape are not penalized under the laws and are considered as matrimonial issues. The consequences of violence against children are debilitating and carry many risks such as that of HIV and other sexually transmitted diseases and damage to reproductive organs.

In Zanzibar, laws relating to Sexual Violence are scattered. There is no single specific law dealing with sexual violence. Consequently, law enforcement agencies do not give special considerations when dealing with SVAC cases. SVAC are treated just like other criminal cases and in some instances are considered to be less serious than other crimes. Victims of sexual violence encounter a number of problems when they testify about the crimes committed against them. Children as the victims of sexual violence and societal stigma places the victims’ credibility, rather than the accused, at risk. Therefore a mechanism such as privacy precautions and rape shield law should be put in place to avoid the introduction of complaint’s sexual record into testimony.

Issues deemed to be in contradiction with Islamic principles should be clearly addressed. Those issues have to be identified and sent to the Committee of Ulamaa for “fatwa” (decision). This is important because most of these issues which are deemed to interfere with religious principles and teachings are wrongly interpreted by some scholars. A unanimous decision of the Committee of Ulamaa may help to resolve the issues.

## **5.2 Conclusion**

In as far as this chapter is concerned, different views from the respondents substantiate as to what extent the laws in Zanzibar are ineffective to curb sexual violence to meet the global demands in enacting effective provisions to curb sexual violence against children.

### **5.2.1 Whether sexual violence against children is very predominant**

In concluding, the fact as to whether sexual violence against children is very predominant. The researcher finds the incidents of sexual violence against children are increasing day to day.

### **5.2.2 Whether the laws to curb sexual violence against children are effective**

The researcher also finds that there so many laws to curb sexual violence against children but they are ineffective because of many loop holes that can be used by the perpetrators of sexual abuse. Thus for example, although there is a provision which explains the minimum age of a child that is 18 but there is no provision in any law in Zanzibar that provides for minimum age for marriage, due this fact there so many incidents of early marriage taking place in Zanzibar and also marital rape is legalized in Zanzibar law because the law states that a husband cannot rape his wife. From that the gist the researcher conclude that although the laws are there but there are ineffective to curb sexual violence against child in Zanzibar

### **5.2.3 Whether the laws to curb sexual violence against children are poorly enforced**

Also the researcher finds that where the law is available, it is poorly enforced “Existing laws relating to SVAC contain some strong provisions but is deficient in an enforcement mechanism to force institutional fulfillment as envisaged under various international, regional and national instruments. Substantially, the legal framework remains ineffective because it is incapable of enforcement. Likewise, children’s rights continue to be compromised because they are analyzed within a religious context instead of being linked to the legal and political framework which demands de facto and de jure human right and dignity”.<sup>122</sup>

Law reform initiatives in Zanzibar must at the same time emphasize substantive and procedural feature of the law<sup>123</sup> particularly issue concerning investigation of sexual violence against children should be privatized. Also, there is need of judicial practices to comply with specified legal standards. Definitely, an effectiveness of the law lies upon a constant critique of judicial practice against people actual experiences in the legal process. “Also it needs to take cognizance of emerging knowledge, and practice in the field. It is clear that the courts in Zanzibar confine themselves to the raw form of the law and rarely, if at all, seek the benefit of studies in the field of sexual violence when presiding over SVAC cases”.<sup>124</sup> This denies them the opportunity to elucidate and develop the law consonant with the peculiarities of the Zanzibar legal context.

### **5.2.4 Other factors that contribute to the predominance of sexual violence against children in Zanzibar**

in concluding on the other factors that contribute to the predominance of sexual violence against children in Zanzibar, the researcher finds that there are many factors that hinders the effort of combating sexual violence against children and these are lack of collaboration among the actors who are suppose to fight SVAC,

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<sup>122</sup> OP.Cit.Daniel Monseberg(ed) pg15

<sup>123</sup> ibid

<sup>124</sup> Ibid

corruption, poor format of pf3 form, court delays and poverty all this contributes a lot in the prevalence of sexual violence against children in Zanzibar and so this conclude even where the laws are available, there are ineffective to curb sexual violence against children

Government's action should go further than the establishment of legal remedy and include support services, response centres and law enforcement training. Reformed legislation concerned with sexual violence will only attains the desired result when joint with enforcement and support services that children require in order to enjoy their rights. Thus, political will is required in order to protect children from violence. In the absence of political will, all process, is immaterial how good they look on paper, they are likely not going to succeed. Therefore the findings in hand facilitate to draw up recommendations

### **5.3 Recommendations**

Problem facing Zanzibar today is how to make possible environment for transforming obligation into action, together with tangible strategies to eradicate unrelenting<sup>125</sup> sexual violence against children and recognize effectiveness of the law to curb sexual violence against children of both institutional and community level in the development of the country.

The researcher have tried to show how sexual violence against children in Unguja is predominant and where the law is available, it is poorly implemented and enforced SVAC is uncontrolled where legal systems and institutions Communities practice normalize various forms of abuse against children that include SVAC, female genital mutilation, early or forced marriage as well as virginity testing. The shame and stigma attached to sexual violence against children, and the lenient penalties meted out on offenders in formal and traditional judicial systems, silence victims.

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<sup>125</sup>Op. Cit. Dr Rurth Aura,

Countries have devoted themselves to stop and finish sexual violence by ratifying international conventions and declarations, thus recognizing the gravity of the crisis. Despite of these efforts, violence against children is still uncontrolled, therefore the need to continue conducting research so as to expose the unseen problem and propose strategies that sexual against children, but also recommend how the survivor can be supported. States have duty to encourage and protect all human rights and fundamental freedoms of all citizens, and they must implement due diligence to prevent, scrutinize and discipline acts of violence against children. The state also has a duty to protect victims from any form of violence, a responsibility for which it ought to be held to account.

Generally, the issue of Sexual violence is insufficiently addressed in separate pieces of legislations. A reform of laws and policies is required in order to address the SVAC issues efficiently. Several gaps in laws and policies have been observed and the following necessary measures are recommended to be taken in order to end sexual violence in general and SVAC in particular:

- The Penal Act of 2004 should be amended to recognize and incorporate a marital rape as a crime sanctioned with severe penalty. Marital rape should include having sexual intercourse with a wife girl who is pre-puberty.
- The Government policy underlying the requirement to marry only after the completion of primary education which is compulsory should be fully supervised. Public should however, be educated on the disadvantages of early marriage.
- Definition of the term “carnal knowledge” in the Penal Act should be reviewed and should not be limited to penetration of male sexual organ into the vagina or anus, but should be extended to cover penetration by use of objects, body parts or even animals.
- Although courts on convicting offenders for most of sexual offences order for the compensation of the victim for physical or psychological injuries suffered, execution of such order usually is impossible.

The offender serving imprisonment for 30 years may never afford to compensate the victim. It is therefore recommended that the Government establish a special scheme for the compensation of victims of SVAC. The scheme should also be responsible for provision of counselling services. Under the scheme, mechanism should be devised for government to recover the fund direct from the offender from attachment and sale of his property.

- The practice of rapist marrying the victim as a way of avoiding the offence of rape should be discouraged. The law should strictly discourage such bad practice as it leads to continuation of trauma.
- Unofficial recompense arrangements among the victim's family and the accused should not substitute criminal impartiality system with imprisonment terms of punishment. Public should be made aware of this bad practice.
- The law on sexual violence cases should clearly stipulate that no conclusion may under any circumstances be drawn from stillness or lack of confrontation of the victim.
- The Penal Act should be amended to provide for awarding compensation to the victims of offences against morality such as attempted rape, abduction, indecent assault, defilement of boys, defilement of idiots and imbeciles, detention of women in brothel, unnatural offences, act of lesbianism and sexual exploitation of children.
- There is a need to develop a respective National Policy Guidelines for Victims of sexual violence for medical professionals, police investigators, prosecutorial staff and institution concerning with social development, aiming at making a consistent measures for sexual violence cases.
- A specific provision within the Penal Act making it a crime for a person who knows to be HIV/AIDS positive to intentionally spread the same to other persons be introduced. The law should provide that all suspects of sexual violence or intentional spreading of HIV/AIDS undergo HIV/AIDS

test immediately upon being arrested. Victims whose assailants are found to be HIV positive should have access to post- exposure prophylaxis (PEP) promptly. However, PEP should be accessible to victims and other services, like counselling.

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**APPENDICES**

**APPENDIX I:**

No.....

Date.....

**QUESTIONNAIRE FOR THE NON GOVERNMENTAL ORGANIZATION.**

**Dear respondent(s),**

My name is Asha Mohammed Ahmed, pursuing LLM International Law at Mzumbe University. I am conducting an academic research as part of my master's programme, the study is about "A critical analysis of effectiveness of the law to curb sexual violence against children in Zanzibar".

Kindly, you are requested to spare your time assist me by answering the following few questions:

1.0 Introductory part.

1.1. Age:

1.2. Gender:

1.5. Education:

1.4. Title:

2.0 Name of Organization:

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2.1. Place located:

.....

2.2. What is/are the objective(s) of your organization?

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3. Have you come through the penal no.6 of 2004 Act?

Yes/No (.....)

4. Does it explains anything concerning sexual violence?

Yes/No (.....)

If yes explain how.

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.....  
.....

2. Does the law meet the needs in combating sexual violence against children

Yes/No (.....)

If yes explain in what ways

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.....  
.....

6. Do you think Zanzibar complies with the conditions of the convection on right and welfare of children which it ratified

Yes/No (.....)

Please explain

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.....  
.....

7. is there any contradiction found from penal act with other law

(Yes/No) (.....)

Please explain.

.....  
.....

8. Does you receive any awareness concerning sexual violence against children ?

Yes/No (.....)

9. Does your organization have any opportunity to provide opinion on issues concerning sexual violence?

Yes/No (.....)

If yes, how many times

Frequently ( )

Regularly ( )

None ( )

10. Is there any cooperation between your institution or department and department, institution or organization in handling sexual violence cases?

Yes/No (.....)

If yes how? ;

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.....

11. What are the consequences if there is lack of collaboration ?

Please mention them and site practical example ;

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.....

**THANK YOU FOR YOUR COOPERATION**

**APPENDIX II:**

No.....

Date.....

**INTERVIEW GUIDE**

**Dear respondent(s),**

My name is Asha Mohammed Ahmed, pursuing LLM International Law at Mzumbe University. I am conducting an academic research as part of my master’s programme about “A critical analysis of effectiveness of the law to curb sexual violence against children in Zanzibar”.

Kindly, you are requested to spare your time assist me by answering the following few questions:

2.0 Introductory part.

1.1. Age:

1.2. Gender:

1.5. Education:

1.4. Title:

2. Does the law meet the needs of combating sexual violence against the children right?

Yes/No (.....)

If yes explain in what ways.

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3.0 Is there any awareness made to public concerning sexual violence against children?

Yes/No (.....)

If yes please explain in which ways and at what time.

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4. Do you think that there is fair trial in proceedings concerning sexual violence?

Yes/No (.....)

Please explain.

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5. Is there any gap in the law ensuring the culprit of sexual violence is being punished?

Yes /No (.....)

If yes please explain

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6. What are the consequences when there is lack of collaboration among the?

Please explain and site practical example ;

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7. What can you say about the overall performance of institutional accountability in Zanzibar concerning sexual violence ?

Excellent (.....)      Satisfactory (.....)      Less impact (.....)

8. Is there any cooperation between the police officers health care officers in proving sexual incidents ?

Yes/No (.....)

9. Do you think the society understands the forms of sexual violence ?

Yes/No (.....)

10. Do you have any additional comment?

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.....

**THANK YOU FOR YOUR COOPERATION**