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Female Same-Sex Legal Status and Its Implications to Women Who have Sex with Women's Health and Well-being in Tanzania: A Public Health Lens

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Authors' contributions

This work was carried out in collaboration among all authors. All authors read and approved the final manuscript.

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ABSTRACT

Same-sex relationships and marriages are increasingly becoming legal in some parts of the globe, in the United States and Europe, in particular. However, opposition is strong and same-sex marriage remains banned in many countries leading to uneven expansion of broader lesbian, gay, bisexual, transgender, and queer or questioning rights globally. Researchers conducted a formative qualitative cross-sectional descriptive and retrospective study with women who have sex with women to, among other objectives, assess and document female same-sex legal status and its implications to these women's daily lives, health, and wellbeing in Tanzania. Results indicate that

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female same-sex is illegal in Tanzania and same-sex activities are punishable on conviction by life imprisonment. As a result, female same-sex behaviors and practices are pushed underground due to fear of stigma, rejection, abandonment, discrimination, and violence from the law enforcement machinery and the general public. In turn, this situation restricts these women from utilizing healthcare services available, which endangers women who have sex with women's health and wellbeing. Recommend for further multidisciplinary, comprehensive, and informative public health research among women who have sex with women to generate data that would facilitate improving healthcare professionals' ability to diagnose, treat, control, and prevent illnesses among women who have sex with women in Tanzania.

Keywords: Female same-sex legal status; female same-sex; homosexuality; female sexuality; sexual orientation; women who have sex with women; Tanzania.

1. INTRODUCTION

A growing number of countries are legalizing same-sex marriage midst a steady development in rights for lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ+) people. However, opposition remains strong in many countries. Same-sex marriage remains banned in many countries, and the expansion of broader LGBTQ+ rights has been uneven globally. International organizations, including the United Nations, have issued resolutions in support of LGBTQ+ rights, but human rights groups say these organizations have limited power to enforce these newly recognized rights.

On June 26, 2015, the U. S. Supreme Court concluded the Constitution grants same-sex couples rights to marry and effectively legalizing same-sex marriage in the thirteen states where it remained banned. In 1996, only 27% of Americans polled approved of same-sex marriages, the number increased to 61% in 2019 [1]. According to Felter & Renwick [1], more than half of the countries that allow same-sex marriage are in Western Europe. Same-sex marriage has been legalized (date of statewide legalization) in the Netherlands (1 April 2001), Belgium (1 June 2003), Spain (3 July 2005), Norway (1 January 2009), Sweden (1 May 2009), Portugal (5 June 2010), Iceland (27 June 2010), Denmark (15 June 2012), France (18 May 2013), the United Kingdom (2013/13 January 2020), Luxembourg (1 January 2015), Ireland (16 November 2015), Finland (1 March 2017), Malta (1 September 2017), Germany (1 October 2017), and Austria (1 January 2019). Italy is the largest Western European country where same-sex marriage is illegal. Its parliament, however, approved civil unions for same-sex couples in 2016.

Available literature on homosexuality in Africa demonstrates that, on the one hand, only South Africa affirmatively permits same-sex marriage. The South African Constitution, therefore, recognized and expanded marriage definition to include same-sex spouses, since December 1, 2005. On 14 November 2006, South Africa became the first African country, the fifth country in the world, the first in the southern hemisphere, the first republic, and the second outside Europe to legalize same-sex [2]. The LGBT in this country are allowed to adopt children.

On the other hand, 49 countries' constitutions do not recognize same-sex relationships, criminalize homosexuality, and penalize sexual acts, whether homosexual or heterosexual, involving children. In the East African Community region, for example, the Burundian Constitution prohibits same-sex marriage [3]. A 2009 revision of the Penal Code made homosexual relations punishable by three months to two years of imprisonment and/or by a fine of BIF50,000–100,000 (appr. $33–66) [4]. The Kenyan Constitution does not recognize same-sex marriages. Kenya's Penal Code criminalizes sodomy. Under this law, a "person who … has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge of him or her against the order of nature" commits a felony, punishable on conviction by a fourteen-year prison term [5]. An attempt to commit an unnatural offense, also a crime, is punishable on conviction by a seven-year prison term [6]. Griffin [7] reported that in April, the Kenya Film Classification Board banned all screenings of *rafiki* film shot in Kenya, directed by a Kenyan, and features an all-Kenyan cast on grounds that it "promoted lesbianism" and went against the country's dominant values. However, despite, this ban it was shown in Durban (South Africa); Zanzibar (Tanzania); and Toronto (Canada) [7].

According to the Global Legal Research Directorate [8], The Rwandese Constitution does

not recognize same-sex relationships. However, the country has no laws against homosexual relations. Referring to The Penal Code Act No. 9 of 2008, The South Sudanese Constitution remans silent on same-sex relationships. However, the country bans certain homosexual acts. Its Penal Code [9] prohibits sodomy, stating that a person who has "carnal intercourse against the order of nature with any person or who allows any person to have such intercourse with him or her" commits an "unnatural offence," punishable on conviction by up to ten years in prison and a fine. The crime is complete at penetration.

According to the Ugandan Constitution, and the Anti Homosexuality Act of 2009, in particular, same-sex marriage is a crime punishable on conviction by life imprisonment. Uganda's Penal Code bans sodomy; hence, anyone who "has carnal knowledge of any person against the order of nature … or permits a male person to have carnal knowledge of him or her against the order of nature" commits a crime punishable on conviction by life in prison. An attempt to commit such crimes, also prohibited, is punishable on conviction by a seven-year prison term. In addition, the Penal Code prohibits perceived "indecent practices" (a term not defined) by any person. On December 20, 2013, the Ugandan Parliament passed a law (and signed by President Yoweri Museveni on February 24, 2014) that criminalizes homosexuality and imposes harsh penalties for violations of its provisions [10]. Under this law, an offense of homosexuality that includes sodomy, homosexual oral sex, or any form of same-sex sexual activity, is punishable on conviction by a fourteen-year prison term. An attempt to commit such an offense is punishable on conviction by a seven-year prison term. Extreme homosexuality, including recidivism, is punishable by up to life in prison as per the Anti Homosexuality Act of 2009. It is within this context that researchers conducted a formative qualitative cross-sectional descriptive and retrospective study with women who have sex with women (WSW) to, among other objectives, assess and document female same-sex legal status and its implications to these women's daily lives, health, and wellbeing in Tanzania.

2. MATERIALS AND METHODS

Our formative study used a qualitative cross-sectional descriptive and retrospective design. The study area included Ilala, Kinondoni and Temeke districts in Dar-es-Salaam City, region. Dar-es-Salaam City was purposely selected because it is Tanzania's largest and commercial city, known harboring persons from different backgrounds and engaging in varied health behaviors and practices. The city was thus projected to allow access to required types of study participants. Study population included adult community members and leaders; and WSW aged 18 years and above, who had lived in Dar-es-Salaam for six (6) months or more; had had engaged in same-sex sex in the past year or in same-sex relationship(s); had knowledge of WSW's lived experiences, and willing to participate in the study.

Researchers collected data using four key qualitative methods: focus group discussions (FGDs), in-depth interview (IDIs), observation, and documentation of same-sex legal records in the country. Investigators trained research assistants (RAs) on the study objectives and procedures, the vulnerability of WSW, ethical issues around this sensitive study, and proper interaction, and interviewing procedures with the study participants. With permission from the participants, FGDs and IDIs were audio-recorded. In addition, the RAs took field notes. All tools were administered in Kiswahili; a language understood by almost everybody in the study area.

The Muhimbili University of Health and Allied Sciences (MUHAS) Institutional Review Board (IRB) reviewed the study protocol and granted ethical clearance to conduct this study. The Dar-es-Salaam Regional Administrative Secretary (RAS), the Ilala, Kinondoni, and Temeke District Administrative Secretaries (DAS), Village/Street authorities granted permission to conduct the study in their respective areas. The process of interviewing neither had harm to nor re-traumatized the study participants. The average duration of the interviews and FGDs was one and half hours. However, as our participants had interest in this study, some IDIs and FGDs took longer time, up to two hours. Researchers transcribed, translated and analyzed data by applying thematic approach where open systematic coding of data in the participants' language and combining emerging emic concepts with preconceived theoretical constructs was followed. The aim was to understand, from the WSW's perspectives and Tanzania Penal Codes, female same-sex legal status and its implications to WSW's health and wellbeing in Tanzania.

3. RESULTS

3.1 Participants' Perceptions of Female Same-Sex Legal Status

During the IDIs and FGDs, investigators asked the study participants to share their perceptions of female same-sex legal status in the country. All of the study participants, WSW and members of the community, knew that female same-sex is illegal and punishable by law in Tanzania. For example, a participant aged 26, never married, started engaging in same-sex in 2012 and a university graduate, reported, *"WSW are found in every region in Tanzania … However, female same-sex is illegal in this country … Thus, female same-sex behaviors and practices are conducted in secrecy and in private places known among themselves"* (IDI, F, 26 years, 2021). Emphasizing on the same point, the same participant added, *"There are advocacy groups for women's rights [including sexual rights] that have empowered us to come out and express our sexual feelings … However, these activities are conducted underground because female same-sex is illegal in this country"* (IDI, F, 26 years, 2021)

A Christian Religious leader interviewed in Ubungo district observed, "*There are few women who have sex with women in Dar-es-Salaam … However, female same-sex is illegal in this country … The women, therefore, practice female same-sex behaviors in secrecy which, makes it difficult to estimate their numbers*" (IDI, H, 43 years, 2021). A participant in a FGD reported, *"The number of women having sex with women in Dar-es-Salaam has increased … You know, female same-sex is illegal in Tanzania … WSW operate underground … However, nowadays those who used to camouflage under their religions or family status are now surfacing to express and defend their sexual feelings and rights"* (FGD_1, 2021).

3.2 Reported Implications of Female Same-Sex Illegal Status to the WSW's Health and Wellbeing

A participant aged 35, started engaging in same-sex at the age of 19, divorced and engages in sex work, had this to say;

As you may be aware, our [Tanzania] government banned importing lubricants … As a result, we use what is available for us … We use Vaseline jelly to avoid bruises from fingering or genital-genital contact … However, our doctor told us that the jelly is harmful to delicate membranes in the vagina … We plead the [Tanzania] government to lift the ban on lubricants importation for our safety (IDI, B, 35 years, 2021).

A participant aged 35, divorced, started engaging in same sex behaviors and practices at the age of 19 and engages in sex work, stated, *"As I told you, the [Tanzania] government banned importing lubricants some years ago … As a result, we use petroleum jelly, especially Vaseline jelly or cooking oil … We plead the government to lift this ban"* (IDI, B, 35 years, 2021). A participant in the FGD with WSW narrated,

We know there are condoms for the fingers and the tongue that we would like to use whenever we have sex … However, they [protective gears] are so expensive and are not available in this country … You may remember, a few years back the [Tanzania] government banned importation of lubricants claiming their availability could fuel homosexual behaviors and practices among the citizenry … As a result, we have unprotected sex (FGD_1, 2021).

Reporting on the lubricants used by fellow WSW, a participant aged 26, identify a tomboy, never married and a university graduate narrated, *"I never use any lubricant … However, my colleagues claim using petroleum jelly … Vaseline or Baby Care … Others use coconut or cooking oil"* (IDI, F, 26 years, 2021). Reporting on the price of lubricants used, a participant aged 46, never married and engages in sex work, stated *"Vaseline jelly, cooking oil and coconut oil are sold at retail shops at a price of TShs. 5000 [appr. $2]"* (IDI, G, 46 years, 2021).

3.3 Tanzania Penal Codes Review

Same-sex relationships/couples have no recognition on Tanzania Mainland and Zanzibar. On the Mainland, The Tanzania Penal Code of 1945 (as revised by the *Sexual Offences Special Provisions Act, 1998*) provides as follows:

Section 138A. Acts of gross indecency between persons,

Any person who, in public or private commits, or is a party to the commission of, or procures or attempts to procure the commission by any

person of, any act of gross indecency with another person, is guilty of an offence and liable on conviction to imprisonment for a term not less than one year and not exceeding five years or to a fine not less than one hundred thousand and not exceeding three hundred thousand shillings; save that where the offence is committed by a person of eighteen years of age or more in respect of any person under eighteen years of age, a pupil of a primary school or a student of secondary school the offender shall be liable on conviction to imprisonment for a term not less than ten years, with corporal punishment, and shall also be ordered to pay compensation of all amount determined by the court to the person in respect of whom the offence was committed for any injuries caused to that person.

According to Part I (3) of the *Sexual Offences Special Provisions Act, 1998*, "gross indecency" in Section 138A "means any sexual act that is more than ordinary but falls short of actual intercourse and may include masturbation and indecent physical contact or indecent behaviour without any physical contact".
Section 154. Unnatural offenses,

(1) Any person who –

(a) has carnal knowledge of any person against the order of nature; or
(b) has carnal knowledge of an animal, or (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

(2) Where the offence under subsection (1) of this section is committed to a child under the age of ten years the offender shall be sentenced to life imprisonment.

Section 155. Attempt to commit unnatural offences,

Any person who attempts to commit any of the offences specified under section 154 commits an offence and shall on conviction be sentenced to imprisonment for a term not less than twenty years.

Section 157. Indecent practices between males,

Any male person who, in public or private –

(a) commits any act of gross indecency with another male, or
(b) procures another male person to commit any act of gross indecency with him, or
(c) attempts to procure a male to commit an indecent act to him, is guilty of an offence and may be sentenced to five years of imprisonment.

In Zanzibar, The Zanzibar Penal Code of 1934, as amended in 2004, provides as follows: Section 132,

(1) Any person who carnally knows any boy is guilty of an offence and shall on conviction be liable to imprisonment for life.
(2) Any person who attempts to have carnal knowledge of any boy is guilty of an offence and shall on conviction be liable to imprisonment for a term not less than twenty-five years.

Section 150,

Any person who:

(a) has carnal knowledge of any person against the order of nature; or

(b) permits a male person to have carnal knowledge of him or her against the order of nature; is guilty of a felony, and is liable to imprisonment for a term not exceeding fourteen years.

Section 151,

Any person who attempts to commit any of the offences specified in section 150 is guilty of a felony, and is liable to imprisonment for a term not exceeding seven years.

Section 152,

Any person who unlawfully and indecently assaults a boy is guilty of a felony, and is liable to imprisonment for a term not less than twenty-five years.

Section 153,

Any woman who commits an act of lesbianism with another woman whether taking an active or passive role shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding five hundred thousand shillings.

Section 154,

Any person who, in public or private commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, is guilty of an offence and liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding two hundred thousand shillings; save that where the offence is committed by a person of eighteen years of age or more in respect of any person under eighteen years of age, the offender shall be liable on conviction to imprisonment for a term not less than ten years, with corporal punishment, and shall also be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for any injuries physical or psychological caused to that person.

According to Section 4, "gross indecency" means "any sexual act that falls short of actual intercourse and may include masturbation and physical contact or indecent behavior without any physical contact."

Section 158,

Any person who:

(a) enter[s] or arrange[s] a union, whether amounting to marriage or not, of the person of the same sex;
(b) celebrate[s] a union with another person of the same sex, whether amounting to marriage or not; [or]
(c) lives as husband and wife [with] another person of the same sex; shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding seven years.

4. DISCUSSION

4.1 Legal Status of Same-sex Relationships in Tanzania

Like in many African countries, female same-sex relationships are illegal in Tanzania. The Tanzania Constitutions (Mainland and Zanzibar) do not recognize same-sex relationships, criminalize homosexuality, and penalize sexual acts, whether homosexual or heterosexual, involving children. All of our study participants were aware that their same-sex behaviors and practices are illegal in this country and if known (to law reinforcing machinery) could be arrested, prosecuted, and penalized as per the Tanzania Constitutions and the Laws. Consequently, receiving death threats and persecutions is normal for LGBT individuals living in countries across Africa [11], making it a matter of survival to keep their homosexuality hidden and rarely reported on [12, 13]. Violence, rape, social exclusion (denial, rejection, stigma, and isolation), and discrimination characterize the daily life of individuals engaged in same-sex relationships in countries where same-sex marriages/relationships are unwarranted [12,13].

In Tanzania, for example, despite the existing anti-same-sex relationships controls (The Sexual Offenses Special Provisions Act of 1998, in particular), in March 2014, a Member of the Parliament (Tanzania) proposed tougher criminal restrictions on the "promotion" of homosexuality. The then Minister for Foreign Affairs specified that "homosexuality is not part of our [Tanzanian/African] culture and we will never legalize it … [and] … The country is willing to lose foreign aid in order to retain [our] anti-LGBT laws" [11]. In June, 2017, the Tanzanian government threatened to arrest and expel activists as well as deregister all (national and international) non-governmental organizations (NGOs) that campaign for gay rights [12].

In August 2017, two newlywed women were brought before the Mwanza Resident Magistrate Court (Case No. 548/2017) charged with acts that signaled lesbianism. Two other persons also appeared before the same Magistrate for their involvement in the lesbian union, which found its way onto social media leading to the arrests. Annet Mkuki, 24, was held for being the Master of Ceremony (MC) at the event where the two women exchanged rings and were shown kissing. Richard Fabian, 28, was alleged the source of the viral social media video breaching a section of Tanzania's Cyber Crimes Act of 2015 [11-17].

Likewise, as part of the crackdown against gays, in September 2017, the police in Zanzibar arrested 20 people (eight men and 12 women) alleged engaging in promoting or inciting homosexuality. On October 17, 2017, the Tanzania police arrested 12 men (two South Africans, one Ugandan and nine Tanzanians) at Peacock Hotel, in Dar-es-Salaam, accused of promoting homosexuality [16,18-21]. On October 29, 2018, the then Dar-es-Salaam Regional Commissioner (RC) announced establishing a

17-member surveillance squad comprised of state officials from the Tanzania Communications Authority, the police and media practitioners that was expected "to begin to get their hands on them [homosexuals] on [the then] next Monday" [21,22]. In 2019, the then Deputy Home Affairs Minister and other government officials echoed threats to conduct mass arrests of LGBT people [23,24]. Ostensibly, "When police have conducted arrests, they have sometimes instructed medical professionals to conduct forced anal examinations to collect 'evidence' of anal intercourse [which] have no scientific basis and are a form of cruel, inhuman, and degrading treatment that can amount to torture" [6,11,25].

Through the Ministry of Health, Community Development, Gender, Elderly and the Children (MoHCDGEC), in October 2017 and February 2018, the Tanzania government banned community organizations from distributing lubricants and conducting HIV outreach to LGBT people. In addition, the government shut down about 40 drop-in centers that provided health services to LGBT society and other key populations (female sex workers, FSWs; and people who use drugs, IDUs) in the fight against HIV [11]. The Human Rights Watch [26] reports that Tanzanian police engage in widespread abuse of LGBT citizens and pro-LGBT media outlets have been shut down by the government.

The life of the LGBT in Tanzania is similar in the two neighboring countries: Kenya and Uganda. According to en.wikipedia.org, [27], LGBT persons in Kenya face legal challenges. Religious, political leaders, and members of the community "condemn homosexuality and transgender identity as public signs of decadence, disease, and immorality." Sodomy is a felony per Section 162 of the Kenyan Penal Code, punishable by 14 years' imprisonment, and any sexual practices between males are a felony under section 165 of the same statute, punishable by 5 years' imprisonment. The state does not recognize any relationships between persons of the same-sex; and same-sex sex is banned under the Kenyan Constitution.

However, there are no explicit protections against discrimination on the basis of sexual orientation and gender identity. In addition, adoption is prohibited to homosexual people [28]. Similarly, same-sex relationships are punishable in Uganda; and same-sex marriage is a crime punishable on conviction by life imprisonment. The law also punishes heterosexuals who engage in oral sex, anal sex and masturbation. In 2014, the government tried to impose the death penalty on those found guilty of being homosexual, because homosexuality is perceived 'un-African' and, therefore, 'non-Ugandan'. However, the controversial law was later repealed [16].

4.2 Illegal Status Implications to WSW's Health and Wellbeing

Our study participants were aware of how the illegal status of female same-sex activities in the country impacts their health and wellbeing directly and indirectly. The WSW interviewed, for example, were aware that the Tanzania government banned community organizations from importing and distributing lubricants and other same-sex products in the country. As a result, WSW are forced to have unprotected sex, or use substances/products, which puts them at high risk of contracting HIV, STIs and vaginal infections [13]. Similarly, the WSW interviewed observed the transgender men face harsh treatment and disrespect whenever they seek healthcare services at (public) health facilities. The healthcare providers often do not keep their information confidential, 'lecture' them on the immorality of their same-sex behaviors and practices instead of providing them with required services. Consequently, WSW who could afford paying for health services opt visiting private facilities. Those who cannot, turn to self-medication and other alternatives perceived efficacious at that time. The implication is that WSW demonstrate poor utilization of healthcare services [29], which limits health professionals' ability to diagnose, treat, control, and prevent illnesses among this group [13,29,30].

4.3 Hope for Legal Change in the Near Future for WSW's Improved Health

The legal status of same-sex marriage has changed in recent years in numerous jurisdictions around the world, and in Africa in particular. According to *Agence France-Presse* [31] in Maputo, a new Penal Code that decriminalizes homosexuality and abortion came into force in Mozambique on Monday, June 29, 2015. However, an activist in Maputo commented, "Most Mozambicans don't deny homosexuality, but one can't say either that it is accepted" suggesting minority groups in that country may not access full (healthcare) rights. In addition to South Africa, other African countries that have legalized same-sex include: Lesotho

(2010), the Republic of Seychelles (May 2016), Botswana (2019) and Angola (February 2021). Similarly, the recent court rulings in favor of minority groups in Kenya (April 2015), and Zambia (May 2015) illustrate significant progress in human rights in general and in LGBT (healthcare) rights in particular [32].

In Tanzania, following the then Dar-es-Salaam RC's intention (on October 29, 2018) to crackdown LGBT people, on the same day, the then Minister for Foreign Affairs and East Africa Cooperation issued an official statement clarifying the government's commitment to human rights. Baerendtsen [21] quoted the Minister saying,

"In his meeting with the press, the Honorable Regional Commissioner announced a campaign to deal with homosexuals in Dar es Salaam. The government of the United Republic of Tanzania would like to clarify that these thoughts are his alone and not those of the government. Moreover, the United Republic of Tanzania would like to take this opportunity to remind and insist that it will continue to respect all international agreements regarding human rights signed and ratified".

At the meeting with the World Bank on November 17, 2018, the then Tanzania President presented, "Tanzania would not pursue any discriminatory actions related to harassment and/or arrest of individuals, based on their sexual orientation" [21]. Indeed, further research is needed to understand the extent to which Tanzania is pushing in this direction.

5. CONCLUSION AND RECOMMENDATIONS

Our study findings clearly show the WSW studied are aware that their female same-sex behaviors and practices are illegal in this country, and if caught could be prosecuted, and punished up to life imprisonment. Similarly, the WSW acknowledged the illegal nature of female same-sex greatly pushes their behaviors and practices underground contributing to their low utilization of public healthcare services available. In turn, this situation has direct and indirect impacts to their health and well-being. In addition, the WSW associated their engagement in unsafe sex with the government's ban on the importation and distribution of lubricants and other protective gears they need against HIV, STIs, and other vaginal infections. Indeed, the illegal nature of female same-sex in the country explains, in part, why there is limited public research among this group in this country and poor healthcare professionals' understanding of these women's health needs. As Hughes and Evans [30] correctly observed, lack of information on WSW has contributed to "A lack of awareness among healthcare professionals about these [WSW's healthcare] needs [that] may lead to ill-informed advice and missed opportunities for the prevention of illness." Researchers recommend further multidisciplinary, comprehensive, and informative public health research among WSW to generate data that would facilitate improving healthcare professionals' ability to diagnose, treat, control, and prevent illnesses among WSW in Tanzania.

ETHICAL APPROVAL

The Muhimbili University of Health and Allied Sciences (MUHAS) Institutional Review Board (IRB) reviewed the study protocol and granted ethical clearance to conduct this study.

COMPETING INTERESTS

Authors have declared that no competing interests exist.

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