



Republic of Malawi

PRESS RELEASE

His Excellency Dr. Lazarus McCarthy Chakwera, President of the Republic of Malawi, on 3 January, 2023 directed that the chapters on findings and recommendations presented to him by the Commission should be released to the public.

Today, 4 January 2023, His Excellency the President has completed reading the remaining chapters of the report and further directed that the Report should be released in full.

The Office of the President and Cabinet, therefore, is pleased to release to the public the full Report of the Commission in accordance with the Presidential directive.

Colleen Zamba

SECRETARY TO THE PRESIDENT AND CABINET

4 January, 2023



MALAWI GOVERNMENT

REPORT OF THE COMMISSION OF INQUIRY

ON THE

**ARREST OF THE HEAD OF THE ANTI-CORRUPTION
BUREAU (ACB) AND ANCILLARY MATTERS**

TUESDAY, 3RD JANUARY, 2023

Telephone: (265) 01 789 311

Communication should be addressed to:
The Chairperson



In reply please quote No.....

**THE CHAIRPERSON
COMMISSION OF INQUIRY ON THE
ARREST OF THE DIRECTOR GENERAL OF THE
ANTI-CORRUPTION BUREAU
PRIVATE BAG 301
LILONGWE 3**

Ref. No. CI/12/2022

3rd January, 2023

His Excellency the President,
State Residences,
Kamuzu Palace,
LILONGWE 3.

Your Excellency,

**COMMISSION OF INQUIRY ON THE ARREST OF THE HEAD OF THE
ANTI-CORRUPTION BUREAU (ACB) AND ANCILLARY MATTERS ON
TUESDAY, 6TH DECEMBER, 2022**

On Friday, 9th December, 2022, it pleased Your Excellency to constitute a Commission of Inquiry into the arrest of the Director General of the Anti-Corruption Bureau on 6th December, 2022. Further, it pleased Your Excellency to appoint us Commissioners to undertake the inquiry and to report to Your Excellency our findings and recommendations.

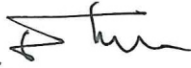
We, Your Commissioners, now have the honour to present, to Your Excellency, the Report.

Yours Respectfully,

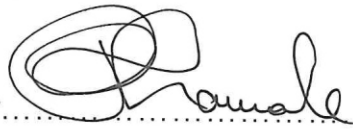
A handwritten signature in black ink, appearing to be 'E. BandaweTwea', written over a horizontal line.

Justice Edward BandaweTwea SC JA (Rtd)
CHAIRPERSON OF THE COMMISSION OF INQUIRY

Mr. Enock D.A Chibwana

Member.....

Father Patrick Thawale

Member.....

Mr. Lot Thauzeni Pansipadana Dzonzi

Member.....

Mr. John-Gift Mwakhwawa

Member.....

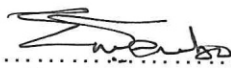
Ms. Innocencia Boko Chirombo

Member.....

Mr. Kassim Mdala Amuli

Member.....

Rev. Elsie Matengambiri Tembo

Member.....


Senior Chief Tengani

Member.....

Ms. Lingalireni Ndekha Mihowa

Member.....

Ms. Maureen Kachingwe

Member.....

Mr. Frank Tisu Kalowamfumbi

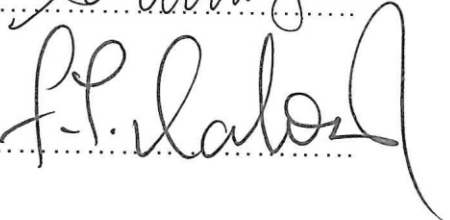
Secretary.....

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ACRONYMS AND ABBREVIATIONS

ACB	-	Anti-Corruption Bureau
ACP	-	Assistant Commissioner of Police
AG	-	Attorney General
A/Supt	-	Assistant Superintendent
BICC	-	Bingu International Convention Centre
CCTV	-	Closed Circuit Television
CID	-	Criminal Investigations Department
DG	-	Director General
DPP	-	Democratic Progressive Party
DPP	-	Director of Public Prosecutions
DIG (A)	-	Deputy Inspector General responsible for Administration
DIG (O)	-	Deputy Inspector General responsible for Operations
DG	-	Director General
ECM	-	Episcopal Conference of Malawi
HRDC	-	Human Rights Defenders Coalition
MCP	-	Malawi Congress Party
MHRC	-	Malawi Human Rights Commission
MHRRC	-	Malawi Human Rights Resource Centre
MoJ	-	Ministry of Justice
MP	-	Member of Parliament
NCA	-	National Crime Agency
NIS	-	National Intelligence Services
OPC	-	Office of the President and Cabinet
PMS	-	Police Mobile Service
SG	-	Solicitor General
SPC	-	Secretary to the President and Cabinet
Sub/Ins	-	Sub-Inspector
TORs	-	Terms of Reference

- UDF - United Democratic Front
- UK - United Kingdom
- US - United States of America

ACKNOWLEDGEMENTS

We, the Commissioners express our gratitude to the President of the Republic of Malawi, His Excellency Dr Lazarus McCarthy Chakwera, for the great honour in appointing us to the Commission of Inquiry on the Arrest of the Head of the Anti-Corruption Bureau (ACB) and Ancillary Matters, and for the trust reposed in us to undertake the task.

The Commission acknowledges, with appreciation, the financial and administrative support from the Government of Malawi, through the Office of the President and Cabinet (OPC) and the Ministry of Finance and Economic Planning in facilitating the work of the Commission.

The Commission is indebted to all the people who spared their time to come and testify before the Commission.

The Commission would like to thank the management and staff of Bingu International Convention Centre, the President's Hotel, Sunbird Capital Hotel, and Sunbird Livingstonia Hotel for services rendered as the Commission used their respective premises for its work.

The Commission would like to thank the Secretary to the Commission, Mr Frank Tisu Kalowamfumbi for well and ably managing the secretarial services for the entire process of the Commission of Inquiry. Our gratitude also extends to the support staff of the Commission from the OPC, the transcribing support from the Judiciary and security support from the Malawi Police Service that the Commission received in the course of discharging the Commission's duties.

THE EXECUTIVE SUMMARY

The President instituted a Commission of Inquiry into the arrest of the Director General of Anti-Corruption Bureau on Tuesday, 6th December 2022. The Commission of Inquiry was fully constituted on 9th December 2022 and provided with Seven (7) Terms of Reference. The Commission was tasked to investigate whether and to what extent the arrest and limitation of the Head of ACB was arbitrary and unlawful. Specifically; the Commission was tasked to find on the following: Firstly, whether the Police received a criminal complaint against the Head of ACB, whether such a complaint was valid and whether upon receipt of such complaint the Police acted in accordance with the law. Secondly, whether the Director of Public Prosecutions (DPP) in his personal capacity, was entitled to lay a complaint against the Head of ACB, in the alternative, whether filing such a complaint was tantamount to an abuse of his office and by extension to establish the legality of the withdrawal of the charge.

Thirdly, whether on the facts available there existed reasonable grounds to suspect that the Head of ACB had committed an offence. Fourthly, whether the rights of the Head of ACB as an arrested person were respected or not. Fifthly, whether the law provides for the suspension of a DPP and if so, whether there are in the instant case valid reasons for the suspension of the DPP; Sixthly, whether in light of the High Court judgment regarding the leaked audio tape of the ACB Director and given the need to preserve the reputation of the ACB, the matter of the leaked audio tape should, in the public interest, be referred for investigation; and lastly, to make necessary recommendations to the President, the office of the DPP, the office of the ACB, the Police and other relevant authorities.

In order to find the answers to the questions, the Commission summoned 35 witnesses and 34 appeared before the Commission. The Commission reviewed several documents related to the matter and held deliberations.

The summary of the Commission's Report findings is as follows; The Commission finds that the complainant laid a criminal complaint before the Police. And further, that even though the formalities in form and content of the complaint did not comply with Standing Order 259, the complaint was valid at law. The Commission finds that there was no investigation in the case as evidenced by the absence of an investigations report. This is inconsistent with the obligation placed on the Police in line with Malawi Police Service Standing Order 245. The Commission finds that the show of force by the Police was excessive considering the nature of the offence and other factors. The Commission also finds that the Presidential directive on the unconditional release of the DG of ACB was not complied with by the Police.

The Commission finds that Dr Steven William Kayuni had the right to lodge a complaint as a citizen in line with Section 41 of the Constitution. However, Dr Steven William Kayuni being the DPP was and is not entitled to bring a personal complaint based on issues pertaining to the office of the DPP. In addition, the Commission finds that Dr Steven William Kayuni, the DPP, demonstrated lack of sound judgement by prioritising his self-interest over the responsibility of his office in relation to the leaked audio. Further, it is the Commission's finding that there was no case that could be withdrawn before the court and therefore, the issue of legality of withdrawal of the charge does not arise.

Based on evidence submitted before the Commission regarding the leaked audio, the Commission finds that there exist reasonable grounds to suspect that the DG of the ACB committed offences.

The Commission finds that other than the show of excessive force and not informing the DG of ACB on arrest where she was being taken to, the rights of the DG of ACB as an arrested person were respected. The Commission finds that the DG of ACB was not manhandled, tortured or disrespected by the Police and that some of the statements made in Parliament on the conduct of the Police in handling the DG of ACB during her arrest were inaccurate and exaggerated.

The Commission finds that the law provides for the suspension of a DPP in Section 32 of the General Interpretations Act (Cap. 1:01) of the Laws of Malawi. The suspension was meant to pave way for investigations by this Commission.

Based on the judgement by Justice Mtalimanja of 30th September 2022 in which the court ruled that: *“if the State deems that there is sufficient cause to commence criminal proceedings against the applicant, let the DPP institute and undertake the same as prescribed by law, accordingly”* the Commission finds that the State has an obligation to respect the decision of the court in view of the various rights of the people that may have been injured by the corruption allegations in the leaked audio and in order to preserve the reputation of the ACB.

In conclusion, the Commission has made recommendations to the President, The Office of the President and Cabinet, the Office of the

Attorney General, The Office of the DPP, the Office of the ACB, The Police and Parliament.

CHAPTER 1

1.0 INTRODUCTION

In the early hours of Tuesday, 6th December 2022, the Director General (DG) of the Anti-Corruption Bureau (ACB) was arrested by the Malawi Police Service for the offence of making use of speech capable of prejudicing a person against a party to judicial proceedings.

His Excellency the State President, Dr Lazarus McCarthy Chakwera, in exercise of the powers conferred upon him under section 2 (1) of the Commissions of Inquiry Act (Cap 18:01), appointed a Commission of Inquiry to investigate matters of public and national interest concerning allegations of improper conduct, abuse of office and illegality surrounding the arrest of the Head of Anti-Corruption Bureau (ACB) and all matters ancillary thereto.

1.1. Composition of the Commission

The Commission consists of eleven (11) members and a Secretary as follows:

Justice Edward Twea, SC (Rtd)	- Chairperson
Mr Enoch Chibwana	- Member
Mons. Patrick Thawale	- Member
Mr Lot Dzonzi	- Member
Ms Maureen Kachingwe	- Member
Mr John-Gift Mwakhwawa	- Member
Ms Innocencia Chirombo	- Member
Mr Kassim Mdala Amuli	- Member

Rev. Elsie M. Tembo	- Member
Senior Chief Tengani	- Member
Ms Lingalireni Mihowa	- Member
Mr Frank Tisu Kalowamfumbi	- Secretary

Ten Commissioners were sworn in on Saturday 10th December 2022 at Kamuzu Palace before The State President His Excellency Dr Lazarus McCarthy Chakwera. Commissioner Maureen Kachingwe was sworn in on Wednesday, 14th December 2022 before the Minister of Justice at Capital Hill.

1.2 The Support Staff

The Commission was supported by the following :-

Mr. Gift Makonyola Gondwe, Deputy Director of Cabinet Services

Ms. Duma Jere, Principal Cabinet Services Officer

Mrs. Alice Chamdimba, Principal Systems Analyst Officer

Mr. Victor Mkwimba, Systems Analyst Officer

A/Supt Griffin Wotchi, Malawi Police Security Officer

Sub/Insp Patrick Keyala, Malawi Police Security Officer

Sub/Insp Esther Mvula, Malawi Police Security Officer

Ms. Gertrude Nkhata, Secretary

Ms. Chikumbutso Kapanda Nyalaya, Transcription Reporter

Ms. Ides Kanyama, Transcription Reporter

Mr. Hannock Njolomole, Messenger

Mr. Davie Chafuwa Gondwe, Driver

Mr. Cedrick Mayera, Driver

1.3 The Conduct of the Commission

- a) The Commission comprises eleven (11) members and a Secretary with a Retired Justice of Appeal as its Chairperson;
- b) Nine members including the Chairman shall constitute a quorum; The Quorum shall be formed at the start of the week, and on any other day, the Commission shall not transact business with less than seven members. The Commission decided so in order to safeguard the public confidence in the Commission's decisions and the integrity of the report;
- c) The Inquiry was held at Bingu International Convention Centre (BICC) between the hours of 9:00 hrs to 17:00 hrs unless the Chairperson directed otherwise;
- d) The Commission decided that the Inquiry shall not be held in public. This is in consideration of the sensitivity of the matter, the urgency of the inquiry to be completed within 14 working days and the arrangements that would have to be in place should the Commission have decided to make the inquiry public;
- e) The Commission had the powers to summon witnesses. Members of the public not called by the Commission were invited to provide evidence. To that effect, the Commission issued a press release on Tuesday 13th December 2022 calling for relevant information on the Arrest of the Director General of the Anti-Corruption Bureau;
- f) The Terms of Reference (TORs) may be added to, varied or amended as required;
- g) All State organs must cooperate fully with the Commission;

- h) The Commission must submit at least three printed copies and an electronic version of the report with recommendations to the President within 14 working days from the day of its swearing-in; and;
- i) The Commission shall where appropriate refer any matter for further investigation or prosecution.

1.4 Terms of Reference

The Terms of Reference of the Commission were to investigate whether, and to what extent the arrest and limitation of the Director General of the ACB was arbitrary and unlawful.

In making the findings, the Commission must particularly inquire on the following;

1. Whether the police received a criminal complaint against the Director General of the ACB, whether such a complaint was valid and whether upon receipt of such complaint the police acted in accordance with the law;
2. Whether the Director of Public Prosecutions (DPP) in his personal capacity, was entitled to lay a complaint against the Director General of the ACB, in the alternative whether filling such a complaint was tantamount to an abuse of his office. By extension to establish the legality of withdrawal of the charge;
3. Whether on the facts available there existed reasonable grounds to suspect that the Director General of the ACB had committed an offence;
4. Whether the rights of the Director General of the ACB as an arrested person were respected or not;

5. Whether the law provides for the suspension of a DPP and if so whether there are in the instant case valid reasons for the suspension of the DPP; and
6. Whether in light of the High Court judgement regarding the leaked audio tape of the ACB Director General and given the need to preserve the reputation of the ACB, the matter of the leaked audio tape should, in the public interest, be referred for investigation;
7. To make necessary recommendations to the President, the office of the DPP, the office of the ACB, the Police and other relevant authorities.

At its first meeting, the Commission deliberated on its Terms of Reference (ToRs) and agreed that all matters in the ToRs be considered as allegations and not facts, and that it was the Commission's duty to establish the facts. The Commission also decided not to predetermine the ancillary matters at the start of its work, but establish them, deliberate on them and agree on what constitutes ancillary matters after its consensus.

1.5 Structure of the Report

The sections of the report have been informed by the Commission's Terms of Reference. The report has Nine Chapters. Chapter One presents an Introduction; Chapter Two presents Factual Background to the issue under Inquiry; Chapter Three presents the Events Leading to the Arrest of the Director General of the ACB; Chapter Four discusses the Developments that happened after the arrest; Chapter Five discusses the Conduct of the Malawi Police Service in so far as the complaint and the arrest are concerned; Chapter Six presents Issues on the Suspension of the Director of Public Prosecutions; Chapter Seven discusses the Leaked Audio; Chapter Eight contains Findings; and Chapter 9 contains Recommendations.

1.6 Methodology of the Inquiry

The Commission adopted the following methodology in executing its mandate:

- a. Discussion of the Terms of Reference (ToRs) to establish a common understanding of the ToRs, and proposed changes or variations that were submitted to the Office of the President and Cabinet;
- b. Development of the Commission's work plan;
- c. Collecting and reviewing any relevant documentation relating to the matter of inquiry;
- d. Identification of the witnesses and documentation required from the witness as they appear before the Commission;
- e. The Commission segmented the witnesses in the following cohorts:
 - i. The arrested person, and persons of interest from the arrested person's side
 - ii. Police Operatives and Police Senior Officials
 - iii. Parliamentarians
 - iv. Government Officials
 - v. Government Ministers
 - vi. The Complainant
 - vii. Members of the General Public
- f. The Commission met a total of Thirty Five (35) witnesses and attendance of One (1) witness; Leader of Opposition Hon Kondwani Nankhumwa MP, was dispensed with. The Commission while acknowledging the importance of his evidence, made its decision to dispense with his evidence after all efforts to get him to testify proved futile. The Commission, deliberated on whether or not it should use its power to enforce the summons, but decided not to enforce the summons;

- g. Development of issues for interrogation from the witnesses;
- h. Drafting and dispatching of the summonses to witnesses;
- i. Developing a press release calling for relevant information from the general public on the matter and dissemination through the mainstream and social media;
- j. Conducting face to face interviews with summoned witnesses;
- k. Analysing information obtained from the witnesses, reviewing literature and the Commission's deliberations;
- l. Drafting of the report;
- m. Submission of the report to the President of the Republic of Malawi.

1.7 Challenges and emerging Issues

The timeframe given to the Commission to carry out its work was very limited. The Commission was given 14 working days to complete its work and submit its report to the State President. The Commission experienced more time pressure as it continued with its work during the Christmas Public holidays. As a result the Commission worked during very abnormal hours throughout its sitting.

The Commission experienced delays in the appearances of some witnesses. This affected the set timelines the Commission had developed at the start of its work.

Despite calling for relevant information on the Arrest of the DG of ACB from members of the public as per the Commission's Press Release dated 19th December 2022, the Commission did not receive any submissions from the general public.

The Commission of Inquiry sent summons to the Honourable Speaker requiring the presence of Honourable Kondwani Nankhumwa MP, Leader of Opposition on 23rd December 2022. Honourable

Nankhumwa MP did not appear on the given date therefore the Commission gave him another date of 28th December 2022. He did not appear on that date too on the ground that he was attending the funeral of Late Mr Alex Nampota (former ACB Director General). Mr Nampota was laid to rest on 27th December 2022 a day before Hon Nankhumwa was supposed to appear before the Commission.

CHAPTER 2

2.0 FACTUAL BACKGROUND

2.1 The Arrest

On Tuesday 6th December 2022 the DG of the Anti-Corruption Bureau was arrested following a complaint statement filed in person by Dr Steven William Kayuni, the DPP on Saturday 3rd December 2022 at National Police Headquarters.

2.2 The Arrest and alleged Corruption Case involving Mr. Zuneth Abdul Rashid Sattar

Dr Kayuni's complaint which led to the arrest of the DG of ACB emanated from a leaked audio in which there was a discussion surrounding a corruption case involving Mr Zuneth Abdul Rashid Sattar, a British national who has a Permanent Residence Permit in Malawi. It is reported that the National Crime Agency (NCA) of the United Kingdom (UK) has been carrying out investigations involving corrupt activities between Mr Sattar and some public officials and private persons in Malawi. (See **The State on the Application of Kezzie Msukwa and Askok Kumar Sreedharan (a.k.a. Ashok Nair) v The Director General of ACB**, Judicial Review Case Number 54 of 2021, High Court Lilongwe District Registry Civil Division (unreported). In or around July 2021, the ACB received information from the NCA about the alleged corrupt activities involving Mr. Sattar in Malawi. Acting on the available information and investigations, the ACB arrested, Hon. Kezzie Msukwa, MP who was at the material time the Minister of Lands and Housing. The ACB also arrested a private individual Mr. Ashok Nair, a business associate of Mr Sattar.

2.3 The Leaked Audio

On Saturday, 22nd January 2022, there was mass circulation of a leaked audio in the social media platforms. The audio was about a private conversation between two individuals who were not identified. These two individuals were discussing corruption cases which were being pursued by the ACB.

2.4 The President's Address to the Nation

On Monday, 24th January 2022, the President addressed the nation on matters involving the ACB, following a meeting he earlier had with the Minister of Justice and the DG of ACB. In his address, the President informed the nation that during the meeting, he also discussed the leaked audio and that the DG of ACB had confirmed to the President the authenticity of the leaked audio.

In his address to the nation, on pages 2-3 of his statement, the President specifically highlighted what the DG of ACB discussed with the third party as follows:

“Specifically, she discusses what one of our foreign partners said to her about the role she must play in the fight against corruption; she discusses exactly when the Bureau will take action on its findings because doing so earlier would lead to compromise; she discusses her knowledge of a bribe accepted by a specific judge two days prior to attending a hearing before that judge; she discusses her emotional and mental state in the course of conducting her work; she discusses the amount of money she believes has passed through the hands of a suspect the Bureau recently arrested; she discusses the sentiments some members of the Judiciary expressed to her about the ruling of a court she argued a case in; she discusses her

belief that the justice system in Malawi will not do what is right in handling corruption cases unless it is forced; she discusses the fact that the lawyers at the Bureau told her that behind the lawyers defending corruption suspects in court are twenty or thirty corrupt lawyers; she discusses how many millions of dollars have been spent on bribery by a corruption suspect; she affirms the expressed view that there is no one in the whole country in whose hands a bribe has not passed; she discusses the defensive attitude of Catholics and Pentecostals to corrupt public officers who may be members of their church, and the pressure those churches are being put under to comply; she discusses how we should forget about Civil Society being of any use in the fight against corruption; she discusses rumours she has heard alleging that she no longer has the support of the President who appointed her...”

The President further stated that although it had been painful to listen to some of the remarks made by the DG of ACB in the audio he however decided to put Malawi first and act in the best interests of Malawians. The President also mentioned that he disagreed with what the DG of ACB had said in the audio that the fight against corruption depends solely on her but that winning the fight depends on all Malawians and not a single person. The President further urged the DG of ACB and all Malawians to conduct themselves professionally, ethically, legally and collaboratively and to guard against exposing themselves to people who will not hesitate to betray others or use others to descend the country into chaos.

2.5 Court decisions on the Leaked Audio

In February 2022, following the leaked audio, Mr. Fryson Chodzi and Mr. Lameck Rashid Nembo, brought a complaint against the DG of ACB before the Senior Resident Magistrate’s Court sitting at Lilongwe, (**Republic v Martha Chizuma**, Miscellaneous Criminal Case Number 160

of 2022). The applicants sought summons to be issued against the DG of ACB because they believed the DG of ACB had committed an offence. They also prayed for consent to commence private prosecution against the DG of the ACB. The court dismissed the application because the applicants did not appear in person to be examined as required by law. Secondly, the court determined that the applicants failed to demonstrate why they sought private prosecution instead of letting the matter to be commenced or instituted by the DPP or Malawi Police Service.

In March 2022, the applicants filed a fresh application in the Chief Resident Magistrate's Court sitting at Blantyre (**Republic v Martha Chizuma**, Criminal Case No. 220 of 2022). The Blantyre court declined to hear them on merits on the basis that the parties and subject matter were the same as those filed before the Senior Resident Magistrate Court sitting at Lilongwe.

On 6th April 2022, another application based on the same facts was brought against the DG of ACB before Senior Resident Magistrate's Court sitting at Mzuzu. This time around the litigant, Brighton Phompo, acted in person. (**Republic v Martha Chizuma**, Miscellaneous Criminal Application No. 24 of 2022). The Mzuzu Senior Resident Magistrate's Court ordered that the Director of Criminal Investigations in consultation with the office of the DPP should investigate the authenticity of the audio and report to the court within 90 days from the delivery of the ruling.

Acting on the said order, on Friday 22nd April 2022, the Malawi Police Service summoned the DG of ACB for interrogation. However, the DG of ACB sought an intervention from the High Court, Lilongwe District Registry through an application for criminal review of the proceedings before the Senior Resident Magistrate's Court sitting at Mzuzu. (**Martha Chizuma v Republic**, Miscellaneous Criminal Case No. 8 of 2022, High

Court, Lilongwe District Registry). The High Court called for the record of the proceedings before the Senior Resident Magistrate's Court sitting at Mzuzu and stayed the order requiring the Director of Criminal Investigations to investigate the authenticity of the leaked audio. In essence the stay by the High Court meant that the DG of ACB could not be called or interviewed by the Police on matters to do with the leaked audio.

Subsequently, the High Court conducted the criminal review after admitting Frighton Phompo as an Interested Party and decided that the proceedings before the Senior Resident Magistrate's Court sitting at Mzuzu were an abuse of court process on the basis that the subject matter was the same though commenced in different courts of similar jurisdiction. The court also found that there was forum shopping in that instead of appealing against the adverse order of the court, the matter kept on being instituted in different courts of coordinate jurisdiction. In the end the court set aside the order directing the Director of Criminal Investigations to investigate the authenticity of the leaked audio.

In the High Court judgment, the court held the view that it should be the State instituting criminal proceedings, if any, against the DG of ACB (See page 41 of the Judgment). The Court further held that individuals should not be seeking permission to conduct private prosecution from the court unless it can be shown that the DPP or the Police have neglected or declined to institute criminal proceedings in a deserving case rather they should lodge their complaint to those with investigative and prosecutorial powers (See page 40 of the Judgment). The court, at paragraph 178 further ruled that: *'If the State deems that there is sufficient cause to commence criminal proceedings against the Applicant, let the DPP institute and undertake the same as prescribed by law, accordingly'*.

The Interested Party has since appealed against this High Court judgment

CHAPTER 3

3.0 EVENTS LEADING TO AND THE ARREST OF THE DIRECTOR GENERAL OF THE ANTI-CORRUPTION BUREAU

3.1 The Complainant

The complainant in the case is Dr Steven William Kayuni, Sex: Male; Age: 40 years; Nationality: Malawian of Mwakayera Village, TA Mwenemisuku, District: Chitipa; Occupation: Lawyer (DPP) Phone: 0883224704; Address: Private Bag 333, Lilongwe 3, Malawi.

3.2 The Complaint

Dr Steven Willian Kayuni states:

“I am a lawyer and DPP for Malawi, I have always been seriously concerned with the January 2022 leaked audio clip where my name as DPP was mentioned a number of times and portrayed as corrupt and compromised yet all am doing is giving my best service to the government and the people of Malawi in terms of prosecution of cases. Following the law and asking for more information before granting consent cannot in anyway be viewed as being corrupt. My job involves giving guidance or directions on numerous cases. This is my role in public service. I believe that whatever was in that clip is something that is tantamount to breach of not only legal ethics as a lawyer and confidentiality, breach of Corrupt Practices Act and utterly criminal libel. The discussion in that audio should never be undertaken by an ACB officer with someone outside enforcement. I was humiliated and portrayed as a corrupt and compromised individual holding public office considering how widely circulated and scandalous it was as I have never had any conversation

with any politician and giving out unsolicited five-point advice through someone when I have openly had conversations with the one who was saying it. Since that clip I have experienced continuous attacks from individuals and group of people on what has constantly come from the audio clip.

I declare that this statement is true to the best of my knowledge and belief and I know that if it is tendered in evidence I shall be liable to prosecution.”

The complaint was signed electronically with names Steven William Kayuni.

Dr Steven William Kayuni informed the Commission that he lodged the complaint in his personal capacity stressing that being DPP does not mean ceding his personal rights.

3.3 Lodging And Receipt Of Complaint

The complainant, Dr Steven William Kayuni indicated that he lodged his complaint on Saturday, 3rd December, 2022, between 11:00 am and 01:00 pm, at the Criminal Investigation Department offices at National Police Headquarters in Area 30 in Lilongwe City. He personally typed his complaint statement on his laptop and appended an electronic signature.

The complaint statement was received by Senior Superintendent Henry Willy Kalungu, a Crime Superintendent in the Criminal Investigations Department (CID) at National Police Headquarters in Area 30 Lilongwe City.

3.4 Planning and the Decision to Arrest

The Commission is of the view that there were several planning meetings on the arrest of the DG of ACB, between Sunday 4th December and Monday 5th December 2022. The Commission noted that there were

variations in the recounting of the number of meetings held, the attendance of the meetings and the times the meetings were held. The Commission endeavoured to obtain minutes of the planning meetings and all witnesses indicated there were no minutes.

3.4.1 Report to the Director of CID

Upon receipt of the complaint statement, Senior Superintendent Henry Willy Kalungu, phoned Mr. George Mnjale, Assistant Commissioner of Police (ACP) and Director of CID, who was then in France, informing him of the complaint by Dr Steven William Kayuni. The Director of CID told him to hold on to the complaint until he returned from France.

On Sunday, 4th December, 2022, Senior Superintendent Henry Willy Kalungu brought the complaint statement of Dr. Steven William Kayuni to Mr George Mnjale ACP, Director of CID, who then phoned the Deputy Inspector General of Police responsible for Administration, Mr. Happy Mkandawire to inform him of the complaint. Senior Superintendent Henry Kalungu was assigned by the Director of CID to be the Investigator of the case.

3.4.2 The Meeting of Sunday, 4th December 2022 at the Office of the Deputy Inspector General of Police responsible for Administration

On Sunday, 4th December, 2022, at around 8:00 pm, a meeting was held at the office of the Deputy Inspector General of Police responsible for Administration. The meeting was chaired by Mr Happy Mkandawire the Deputy Inspector General responsible for Administration who was then Acting Inspector General in the absence of the Inspector General who was in Zambia. Present at that meeting were: Mr. Casper Chalera, Deputy Inspector General of Police for Operations; Mr. Ackis Angello Muwanga,

Commissioner of Police for Operations; Mr George Mnjale, Assistant Commissioner of Police and Director of CID; Mr. Levison Mangani, Senior Assistant Commissioner of Police and Director of Prosecutions; Senior Superintendent Prescott Zuze Mwayiulipo, Service Legal Officer.

At this meeting Senior Superintendent Prescott Zuze Mwayiulipo was asked to produce an alleged injunction that Ms Martha Chizuma was said to have obtain from the court restraining the Police from interviewing her. Senior Superintendent Mwayiulipo requested Inspector William to provide the injunction. The injunction could not be traced and because of this the meeting was closed.

3.4.3 The Meeting of Monday 5th December 2022 at the Office of the Deputy Inspector General of Police responsible for Administration

On Monday morning of 5th December 2022 a meeting was held chaired by Mr Happy Mkandawire, Deputy Inspector General of Police responsible for Administration, in his acting capacity as Inspector General of Police. Present at that meeting were: Mr. Casper Chalera, Deputy Inspector General of Police responsible for Operations; Mr. Ackis Angello Muwanga, Commissioner of Police responsible for Operations; Mr. George Mnjale, Assistant Commissioner of Police and Director of CID; and Mr. Levi Mangani, Senior Assistant Commissioner of Police and Director of Prosecutions.

The meeting focused on how the Police was going to deal with the complaint statement. The meeting considered a High Court Judgement by Justice Mtalimanja that was understood to give power to any person that was aggrieved by the leaked audio of January, 2022 to lodge a criminal complaint. It was then that the Director of CID was instructed to obtain a

Warrant of Arrest for the DG of ACB from the Court and pursue an investigation.

On the same Monday, 5th December, 2022, at around 2:00pm another meeting was held in the office of Mr. Casper Chalera, Deputy Inspector General for Operations who chaired the meeting, present were all officers that are said to have attended the meeting on Sunday 4th December, 2022 with the exception of Mr Happy Mkandawire, Deputy Inspector General of Police for Administration. At this meeting Mr Levison Mangani, Senior Assistant Commissioner of Police and Director of Prosecutions produced a High Court ruling by Justice Mtalimanja of 30th September, 2022. Mr Casper Chalera, Chairperson of the meeting informed the meeting of the complaint by Dr. Steven William Kayuni, the DPP and that based on the complaint legal action was supposed to be taken. This meeting construed that Judge Mtalimanja's ruling at Paragraph 178 had removed any restraint on the Police from taking action on the leaked audio.

Paragraph 178 of the Judgement reads "*If the state deems that there is sufficient cause to commence criminal proceedings against the Applicant let the DPP institute and undertake the same as prescribed by the law accordingly*". It was then, that the meeting agreed that Mr George Mnjale ACP and Director of CID should proceed to investigate and arrest the Director General of ACB.

3.4.4 Obtaining the Warrant of Arrest

On the same day, Monday, 5th December, 2022, Senior Superintendent Henry Willie Kalungu who had been designated Investigator in the case prepared the Warrant of Arrest and supporting affidavit for the issuance of the same by the Lilongwe Magistrate Court.

The Warrant of Arrest was addressed to all police officers and it identified Martha Chizuma, the DG of ACB whose full particulars were not advised, as the object of the warrant. The statement of the offence being; *“making use of speech capable of prejudicing a person against a party to judicial proceedings contrary to section 113 (1) (d) of the Penal Code”*.

The particulars of the offence being, Martha Chizuma, during the month of January, 2022 in the City of Lilongwe in the Republic of Malawi, while judicial proceedings in the High Court in which Ashok Kumar Screedharan is a party, made use of a speech through an audio clip which was capable of prejudicing Dr. Steven William Kayuni, the Director of Public Prosecutions for Malawi, by stating that the said Dr. Steven William Kayuni is corrupt and compromised. The Warrant commanded the Police as follows: *“You are hereby directed to arrest the said Martha Chizuma, produce her before this court in the execution of this Warrant.”*

3.4.5 Preparations for the Arrest

At the Monday 5th December 2022 meeting chaired by Mr Happy Mkandawire, Deputy Inspector General Administration, Mr George Mnjale ACP, the Director of CID who had been directed to organise the operation to investigate and arrest Ms Martha Chizuma was asked to mobilize Police officers from the Criminal Investigation Department and the Police Mobile Service A Division.

From the CID, he mobilized Superintendent Raphael; Assistant Superintendent Kasalika; Assistant Superintendent Kamphandira; Detective Sub Inspector Chimpeni; Detective Sub Inspector Ken Phiri; Detective Inspector Kanyongo; Detective Sub Inspector Sipiliano; and Senior Superintendent Henry Kalungu. From the Police Mobile Service (PMS) A Division, he mobilized the following officers: Superintendent

Bwanali; B3533 Sub Inspector Gwede; B3686 Sub Inspector Zwide; B6095 Sergeant Nyirenda; 4767 Constable Chinthenga; 5097 Constable Kapanda; 5088 Constable Tambala; B7258 Constable Ndawa; B7259 Constable Zinkambani; and B7360 Constable Chisambo.

In total there were nine (9) CID officers and ten (10) PMS officers, three of whom were female. The officers were told to assemble at the main gate of National Police Headquarters in Area 30 at 4:00 am on Tuesday 6th December 2022.

At 3:45 am, that morning, Superintendent Alfred Bwanali, Deputy Commander at PMS A Division assembled his officers at the main gate of National Police Headquarters as directed by Mr George Mnjale ACP and Director of CID. He allocated 2KC rifles to each of them and he armed himself with a baton stick. At this time he was not aware of the nature of the operation and where it would take place. He informed his officers that they would be briefed when the Director of CID arrives.

At 4:00 am, Mr George Mnjale ACP arrived together with a contingent of CID personnel. He briefed the PMS officers that they were going to take part in an operation. Their task was first to provide security coverage to the CID officers throughout the operation and secondly to cordon the house upon arrival at the site of the operation. The Police Mobile Service were instructed to follow the two CID vehicles. Three vehicles were used in this operation.

Upon arrival at the gate to the Presidential Villas the Police were met by Sub Inspector Micalasi Chatuwa who was among the 5 PMS guards on duty at the time. He informed the Commission that he asked the officers in the leading motor vehicle as to where they were headed to but they refused to mention their destination. He let them enter the Presidential

Villas gate. He assumed they were headed for a house which is sometimes used by the State House. He followed the vehicles and observed they were parked at Ms Chizuma's house.

When the vehicles came to a stop, the PMS officers were directed to cordon a house and eventually realised the house was the residence of the DG of ACB Ms Martha Chizuma. The CID officers went to the front of the house and knocked at the front door.

3.4.6 Entry into Ms Martha Chizuma's House and Arrest

After knocking at the door, a lady opened the door for the Police officers. The lady is Ms Ziona Likagwa, a cousin to Ms Martha Chizuma. All the nine CID officers led by Mr George Mnjale ACP entered the house. It was whilst in the house that they realised that there were no female officers amongst the CID team. They therefore asked for female officers from the PMS. Three female officers, 4767 Constable Chinthenga, 5097 Constable Kapanda and 5088 Constable Tambala were disarmed and entered into the house joining the CID team. The CID team asked Ms Ziona Likagwa whether Ms Martha Chizuma was around. She confirmed that Ms Martha Chizuma was in the house and so she went upstairs to inform her of the presence of the Police and that they were looking for her. She came down and informed the Police that Ms Chizuma was coming. After a few minutes the officers complained about Ms Chizuma's delay and they sent Ms Ziona Likagwa back upstairs to call her. One Police officer who was outside the house threatened Ms Ziona Likagwa that if Ms Chizuma took any longer they would go and pick her up from her bedroom. Whereupon Ms Likagwa went up again and on return assured the Police that Ms Martha Chizuma was dressing up and would be coming down. Meanwhile Ms Chizuma attempted to make a call to the Inspector General of Police

which could not go through and another to Reverend Zacc Kawalala who did not pick up.

Ms Chizuma then came down and met Mr George Mnjale at the base of the staircase who told her that they had come to arrest her in connection with a January, 2022 leaked audio. She was shown the warrant of arrest but could not read because she didn't wear her glasses save for the name of Steven William Kayuni which was in bold. Ms Martha Chizuma reminded them that the matter was in Court. She was asked to accompany the officers to the Police Station. While accompanying the Police out of her house, she instructed Ms Likagwa to call her brother "*muwayimbile achimwene*" later identified as Robert Chizuma.

As they were getting out of the door, a male officer grabbed a female officer who was lagging behind, dragged her and pushed her to position her right behind Ms Martha Chizuma. The female officer accidentally bumped into Ms Martha Chizuma.

3.4.7 Movement from Presidential Villas to Namitete Police Post

When the officers took Ms Martha Chizuma out of the house they led her to one of the Police Land cruiser motor vehicles where she occupied the middle seat, sitting between two female Police Officers and the third female Police Officer sat directly behind her. Mr George Mnjale ACP and Senior Superintendent Henry Kalungu, the Investigator, travelled in the same vehicle. Meanwhile, the Police had not yet told her where they were taking her to. It was only when they got outside the main gate of the Presidential Villas and on their way that they informed her that she was being taken to Namitete Police Post. They drove all the way to Namitete in a convoy of three vehicles, with the vehicle carrying PMS officers

coming just behind the vehicle carrying Ms. Martha Chizuma. At that point the PMS officers were not aware where Ms Martha Chizuma was being taken to.

3.4.8 Arrival at Namitete Police Post and placement in Custody

On arrival at Namitete Police Post, the arrest party was met by senior Superintendent Jessie Phimba the Officer-in-Charge for the Post, who was in the company of Detective Sub Inspector Mwandira the Station Crime Investigations Officer. She had earlier in the morning received a phone call from Mr. Ackis Muwanga, Commissioner of Police and Director of Operations informing her to prepare for the arrival of Ms Martha Chizuma, the DG of ACB. She then phoned Mrs Eunice Mwamkiri, ACP the Station officer of Lilongwe Police Station to ask if she was aware of the arrest of Ms Martha Chizuma but was told that she was not aware. Namitete Police Post is under Lilongwe Police Station and is about 48 kilometres from the Presidential Villas.

Senior Superintendent Jessie Phimba led Mr George Mnjale ACP, Ms Martha Chizuma and two female officers to her office. Mr George Mnjale ACP briefed her that Ms. Martha Chizuma was brought to Namitete Police Post for safe custody and that later that morning they would return to record a statement.

Mr Mnjale asked Ms Martha Chizuma if she wished to call her lawyer and when he was told she didn't have a phone, he offered her his phone. Ms Martha Chizuma used Mr Mnjale's phone to call her lawyer Ms Martha Kaukonde.

The Officer-in-Charge then took Ms Martha Chizuma to the counter where she instructed Detective Sub-Inspector Mwandira to record her details in

the Cell Book. She also instructed 1133 Sub Inspector Joyce Masekese to clean Cell 2 where the male occupants had been moved to join other male accused persons in Cell 1. Further, she also instructed the Sub Inspector to provide a mattress. The Cell was cleaned using chlorine and the mattress was placed in the Cell. Ms. Martha Chizuma was then placed in the Cell after her details were recorded in the Cell Book and she handed over her shoes at the counter on instruction from the Policer In Charge. She was the sole occupant of Cell 2.

Later, that morning Ms Martha Chizuma was called out of the Cell and told to line up together with the male occupants of Cell 1 who were already in the corridor. Upon arrival of the Officer-in-Charge, she was taken off the line back to her Cell. Later, Ms Martha Chizuma was taken out to a place behind the Police building where her visitors had gathered and there was a Police Officer placed as a sentry. There were other Police Officers placed behind the Police building. At first she sat on the floor but later the Officer who was sentry brought a chair. At this time she was also allowed to wear her shoes which were brought to her and advised that she didn't have to surrender them again. It was at this place behind the Police building that her relations, members from Women Lawyers Association, other lawyers, Malawi Human Rights Commission members and members of the Legal Affairs Committee of Parliament led by the Chairperson Hon. Peter Dimba met her.

At and around 9:00 am, Ms Martha Chizuma was called into the Officer-in-Charge's office accompanied by her lawyer, Ms Martha Kaukonde, and her brother. Counsel Pempho Likongwe joined them later. In the office were; Mr George Mnjale ACP, Director of CID, and Sub/Superintendent Henry Kalungu, the Investigator of the case, who cautioned her and read out the charge. She chose to exercise her right to remain silent following

advice from her lawyer. At this time the Officer-in-Charge Namitete and Robert Chizuma, Ms Martha Chizuma's brother, were outside the office.

The Police then indicated to Ms. Martha Chizuma that they were releasing her on Police bail. They then recorded her details and those of Robert Chizuma as a surety. She was then told to report for bail on Monday, the 12th of December, 2022 at National Police Headquarters in Area 30. She was then allowed to leave. She left in her official vehicle driven by her designated driver.

Ms Martha Chizuma did not report for bail on 12th December 2022 after the Police informed her lawyer that she would not have to report for bail until further notice.

CHAPTER 4

4.0 THE DEVELOPMENTS AFTER THE ARREST OF DIRECTOR GENERAL OF ACB

4.1 Parliament

On the day of the arrest of the DG of ACB Tuesday 6th December 2022 Parliament was in session and the House met at 9.30am. The Speaker Right Honourable Catherine Gotani Hara MP was in the Chair.

Honourable Richard Chimwendo Banda MP who is the Leader of Government business in Parliament and Minister of Youth and Sports arrived at Parliament at 8.30am. He convened a caucus of Ministers which included Ministers of Homeland Security, Minister of Justice, Minister of National Unity, Minister of Transport and Public Works (who is also Government Chief Whip) and others. Honourable Chimwendo Banda informed the caucus that between 5:00 am and 6:00 am he had received information through the social media of the arrest of the DG of ACB.

He informed the caucus that he called the Minister of Justice, the Speaker of Parliament and both indicated that they only learnt about the news through social media. He informed the caucus that he spoke with the Deputy Inspector General of Police for Operations Mr Chalera who confirmed the arrest but indicated he could not disclose reasons for the arrest. In the meeting, the Minister of Homeland Security and the Minister of Justice indicated that they had no prior knowledge of the arrest and that they only learnt about it through the social media as well. The Minister of Justice reported in the meeting that the President had directed that the DG of ACB be released without charge. The Minister further informed the caucus that he had relayed the instruction to the Deputy Inspector General

of Police responsible for Operations. The caucus concluded and agreed that the Government should make a statement on the matter in the House.

When Parliament met, it had intended to deal with general business of the day however, Honourable Kamlepo Kalua MP, Independent Member for Rumphi East, asked Government side if it was true that the DG of ACB had been arrested and demanded Government to furnish the House with information. Honourable Kamlepo Kalua MP further queried “... *As Malawians we demand an honest answer, the truth, justice and that Government should show competence and demonstrate that they are in control of matters of Government and national interest...*”

The Minister of Justice Honourable Titus Mvalo expressed shock at the arrest of the DG of ACB and he reported that he had not been aware of the matter. He indicated that he learnt about the arrest through social media that morning. He informed the House that the DG of ACB was released without charge and undertook to get to the bottom of the matter that day.

Democratic Progressive Party (DPP) Member of Parliament for Zomba Chisi Honourable Mark Botomani MP was surprised that the Minister of Justice and the whole Government was not aware of the arrest and wanted further explanation from Government as the issue had generated a lot of interest not only in the house but also in the international community.

The Leader of Opposition Honourable Kondwani Nankhumwa MP, commented on the statement made by the Minister of Justice that the DG of ACB had been released unconditionally and said that he had contrary information from Namitete Police Post that the Director General was still in Police custody and he asked the Minister of Justice for an explanation.

The Minister of Justice responded that he had information that the DG of ACB was released from custody and she was on her way back from Namitete.

Honourable Jolobala United Democratic Front (UDF) Member of Parliament for Machinga East commenting on the matter demanded that the Minister of Justice should resign immediately.

Honourable Yeremiah Chihana MP for Mzimba North moved the Speaker to suspend the Parliament sitting until the DG of ACB is released.

Honourable Chimunthu Banda MP, Independent Member for Nkhotakota North supported the views of Honourable Yeremiah Chihana and said that Government should bring a report since the information given to Parliament was haphazard and it was not clear if the DG of ACB was released or not.

Honourable Hara MP, Government Chief Whip in Parliament and Minister of Transport and Public Works confirmed to the house what the Minister of Justice had told the House that the DG of ACB had been released unconditionally. He confirmed the same to the Commission when he came to testify.

Honourable Richard Chimwendo Banda MP, moved the Speaker to suspend the House so that Government should get more information on the matter and update the House. The House was then suspended.

Honourable Victor Musowa, MP, Democratic Progressive Party member of Parliament for Mulanje Bale informed Parliament that when he learnt that the DG of ACB was arrested, together with the Chairperson of Legal Affairs Committee, Honourable Peter Dimba and other members of the Legal Affairs Committee, went to Namitete Police Post and visited the DG of ACB.

The House was suspended to allow Government to bring a report on the matter.

The Minister of Justice Honourable Titus Mvalo condemned the arrest and said as a result of prompt intervention of Government, the DG of ACB was released from Police after she was charged and that the charges had been withdrawn unconditionally. Further he informed the House that the President had appointed a Commission of Inquiry to enquire into the circumstances of the arrest.

The Leader of Opposition Honourable Kondwani Nankhumwa, MP, informed the House that he together with Opposition and Government members had visited the DG of ACB at her residence. He added that although she was released, the release was conditional as she was on bail.

Members of Parliament insisted to know if the Minister of Justice was being truthful in indicating that he had no prior knowledge of the arrest because the office of the DG of ACB falls under his Ministry. The Minister emphatically denied any prior knowledge of the arrest.

At the Commission of Inquiry, Honourable Peter Dimba MP, Chairperson of Legal Affairs Committee of Parliament testified that he was shocked and disturbed to learn of the arrest of the DG of ACB. He visited the DG of ACB at Namitete Police Post to cheer her up. Honourable Dimba, MP was of the view that the event will have adverse effect on the Government. Members of Parliament questioned why it was possible that the arrest could have happened without Government Ministers knowing. Ministers vehemently distanced themselves and questions were being raised as who was actually running the Government and who was in control.

On 8th December 2022, the Speaker received a letter from the Attorney General advising on the position of the withdrawal of charges against Ms Martha Chizuma, the DG of ACB stating “ *I advise that the withdrawal of charges can be done by any public prosecutor while the powers to discontinue a criminal case before any court of law lies on the Director of Public Prosecutions. I would like to advise that since Ms. Martha Chizuma was not taken to court to be charged with offences arising from a complaint brought by the Director of Public Prosecutions, there is no charge before any court of law in Malawi to be withdrawn*”. This was in response to the demands the opposition had made on written evidence of the unconditional release of the ACB Director General.

The Commission observed that some pronouncements in the House were inaccurate and exaggerated.

4.2 The Executive

Government Ministers became aware of the arrest of the DG of ACB on 6th December 2022 in the early hours before 7.30 am through social media platforms. Honourable Richard Chimwendo Banda MP, Minister of Youth and Sports, called for a meeting with seven (7) Ministers and present in the meeting were: Minister of Justice; Minister of Homeland Security; Minister of National Unity; Minister of Transport and Public Works; and Minister of Information and Digitalisation.

At this meeting, Hon Jean Muonaouza Sendeza MP, the Minister of Homeland Security, informed the other Ministers that she had earlier met the Deputy Inspector General for Administration Mr Happy Mkandawire and Deputy Inspector General of Police for Operations Mr Chalera and who confirmed of the arrest but did not give reasons for the arrest. The

Minister of Homeland Security lamented before the Commission that she and the President should have been informed prior to the arrest.

In this meeting the Minister of Justice said he had spoken to the President who directed that the DG of ACB should be released without charge. The President's directive was also confirmed to the Commission by the Deputy Inspector General of Police for Operations.

Following the caucus in which the arrest of the DG of ACB was confirmed, Minister of Information Honourable Gospel Kazako released a press statement in which the Government was demanding Police accountability over the arrest of the ACB DG. Minister Kazako also testified before the Commission that he had requested the Minister of Homeland Security to make a statement about what had happened as it was for necessary for the public to know what had happened.

The Minister of Justice delivered a statement in Parliament that the President had issued a directive to release the DG of ACB unconditionally. The Minister of Justice informed the House that the DPP was suspended pending investigation results of a Commission of Inquiry.

The Commission was informed through the testimony of Honourable Minister of Justice Titus Mvalo that on 6th December 2022, during one of the Parliamentary breaks Malawi Congress Party (MCP) Members of Parliament caucused at the Party Headquarters. The MPs' caucus agreed that some delegates should call on the President on the matter. A delegation comprising Honourable Mvalo, Honourable Eisenhower Mkaka, MP and Honourable Sendeza, MP had an audience with the President on the arrest of the DG of ACB at 12:30 pm. The Minister indicated to the Commission that the purpose of the meeting was to ensure that something visible and tangible was done about the issue.

The Minister of Justice Honourable Mvalo testified to the Commission that on 6th December 2022, after learning of the arrest of the DG of ACB, he tried to contact Dr. Steven Kayuni, the DPP through the phone but his number was not reachable. The Minister informed the Commission that it was only on the 8th December, 2022 that Dr. Steven Kayuni responded to the Minister's text. In response to the Minister's request to withdraw the charge, Dr. Steven Kayuni said that the Minister should contact the Deputy Inspector General of Police responsible for Administration to speak to him on the matter. The Minister of Justice confirmed to the Commission that he had conveyed the President's directive on the unconditional release of the DG of ACB to the Deputy Inspector General of Police responsible for Administration who was Acting Inspector General. In his testimony to the Commission the Deputy Inspector General responsible for Administration stated that he was of the opinion that the Presidential directive on the unconditional release of the DG of ACB was unlawful.

4.3 Government Officials

The Secretary to the President and Cabinet (SPC) Ms Colleen Zamba, in her testimony to the Commission indicated that she became aware of the arrest of the DG of ACB through social media platforms and that no one contacted her on the arrest. She had also learnt that it was the DPP that complained and since she was leaving the country she concentrated on the establishment of the Commission of Inquiry as directed by the His Excellency the President. The SPC had tried to contact the Minister of Justice to confirm about the arrest and was not able to reach him, but later the Minister confirmed about the arrest through a WhatsApp message. The SPC confirmed to the Commission that she was aware of the suspension of the DPP.

The Attorney General (AG) Honourable Thabo Chakaka Nyirenda testified that he only got to know about the arrest of the DG of ACB around 8:00 am through social media. The AG indicated that on high profile arrests he expected that at a minimum the President and Line Minister should be informed before the arrest.

The AG testified that he issued an opinion to the Speaker of Parliament on withdrawal of charges against the DG of ACB following demands from Parliament for written evidence on the withdrawal of charges. The opinion was that since there was no formal charge before the court against the DG of ACB then the issue of withdrawal did not arise.

The Commission was informed by the AG that on the day of the arrest he was approached by the British High Commissioner and the US Ambassador on the arrest. The US Ambassador had demanded the unconditional release of the DG of ACB and that if this was not done, the US Government would subject the people involved in the arrest to travel bans, and impose economic sanctions on the country. The British High Commissioner asked that the Malawi Government should ensure that the Director General was released.

The Commission was informed by the AG that the relationship between the DG of ACB and the DPP was strained. In the AG's opinion this emanated from differences in opinion in the course of executing their duties. However, the AG's concern was more to do with lack of management of confidential information by the DG of ACB which was jeopardizing some operations. The AG confirmed to the Commission that he had been consulted on the suspension of the DPP.

The Solicitor General (SG) and Secretary for Justice, Mr. Allison M'bang'ombe informed the Commission that on Monday, 5th December

2022 he found a Loose Minute which indicated that the DPP had taken leave from 5th to 8th December 2022.

The SG informed the Commission that he became aware of the arrest of the DG of ACB through a private lawyer in the early morning of the day of the arrest 6th December 2022. He indicated he was shocked at the news and called the Attorney General who said that he was surprised and was not aware of the arrest. The SG told the Commission that he also called the Minister of Justice who indicated he was equally surprised about the arrest.

The SG reported that on this day he called the DPP to inquire about the arrest, but his phone was not answered. The DPP eventually responded to the SG's calls the following day on Wednesday, 7th December, 2022 and in their texts discussion the DPP admitted to have lodged a personal complaint against the DG of ACB. The DPP said what prompted him to lodge the complaint was that since the leaked audio he was receiving calls and messages that were threatening and harassing him. The SG informed the Commission that the DPP said '*enough is enough*'. The SG further informed the Commission that the DPP had opted for a criminal complaint rather than a civil suit.

The SG informed the Commission that the relationship between the DPP and the DG of ACB was not cordial and that the Minister of Justice had tried to reconcile them, but the situation has not changed. The SG indicated in his opinion that the working relationship started deteriorating when the ACB had arrested the DPP's witnesses in the infamous '*Cement-gate*' which was then at advanced stage without consulting the DPP. Because of the arrest, witnesses were becoming uncooperative. The SG also informed the Commission that what also strained their

relationship was the DPP's refusal to grant consent for prosecution of the former Minister of Lands Honourable Kezzie Msukwa, MP.

The Deputy Director General of the ACB Mr Elia Daniel Bodole testified that he learnt from social media platforms that the DG of ACB was arrested. Mr. Bodole indicated that he called Mr Chalera Deputy Inspector General of Police responsible for Operations at 9:27 am, who confirmed of the arrest and indicated that the DG of ACB was at Namitete Police Post and that she would be recorded a statement and released on bail.

Mr. Bodole reported to the Commission that he was to travel to Kasungu for preparations for the commemoration of the Anti-Corruption Day on the 6th December 2022. In the morning, he heard news about the arrest of the DG of ACB. Upon confirmation of the arrest, Mr. Bodole informed the Commission that he made arrangements to attend the National Integrity Committee interface briefing with His Excellency the President which was initially supposed to be attended by the DG of ACB.

Mr. Bodole informed the Commission that during the audience, the President expressed his dismay on the arrest of the DG of ACB and that the President said he would take up the issue and would constitute a Commission of Inquiry on the arrest.

Mr. Bodole informed the Commission that after the meeting with the President, when he returned to the ACB office at about 1:00 pm, he found heavy presence of the Police surrounding the ACB building. He was informed that the Police had surrounded the building from 7:00 am. The Police left the premises after 4:00 pm.

Mr. Bodole phoned the DG of ACB to check on her and they spoke later in the evening. Mr. Bodole informed the Commission that the Director General 'sounded disturbed'

Mr. Bodole testified before the Commission that the President directed that the ACB be given more funds for prosecution of cases. He further informed the Commission that since the Sattar case the ACB has been having difficulties in getting the usual assistance they used to get from the offices of the AG and the DPP. Mr. Bodole told the Commission that the ACB was unable to proceed with cases related to Mr. Zunneth Sattar due to the delay in the AG issuance of the letter asking for Mutual Legal Assistance from the British Authorities.

The Director General of National Intelligence Services (NIS), Mr. Dokani Ngwira, told the Commission that on 6th December, 2022 at around 5:00 am he learnt that the DG of ACB was arrested. He had wanted to visit her at Namitete Police Post but before leaving for Namitete he heard that she was released. On his way to brief the President, Mr. Dokani Ngwira had stopped by the house of the DG of ACB to give her moral support. The Director General of NIS informed the Commission that he did not know the cause of the arrest and the Police leadership was not forthcoming with information. The NIS DG informed the Commission that it appeared the DPP lodged the complaint in his personal capacity. The NIS DG testified to the Commission that the charge against the DG of ACB emanated from the leaked audio. He further informed the Commission that he was surprised that the operation to arrest was like a *“full Government operation involving someone who was a national security threat, yet, it was a private complaint”*. The NIS Director General confirmed to the Commission that the NIS had carried out its intelligence investigation on the leaked audio and had produced a report. The NIS Director General informed the Commission that their investigations revealed that the other person in the audio was Mr Anderson Mwakyelu, who uses Namalomba as his pseudo name on Facebook. The NIS Director General also testified

to the Commission that it was difficult to know the motive for the recording and leakage of the audio. He further testified that since January, 2022 after the Zunneth Sattar case, there had been threats on the DG of ACB.

The NIS Director General informed the Commission that after visiting the DG of ACB he proceeded to meet the President. The NIS Director General testified to the Commission that *“the level of anger that the President expressed showed that he was not aware of the pending arrest of the Director General of ACB.”*

4.4 The Public, Non-State Actors and other Stakeholders of interest

The arrest of the DG of ACB generated a lot of public interest. Some Non-State Actors issued public statements. Among those that issued press statements are:-

- (i) The Joint Civil Society Platform composed of Centre for Civil Society, Youth and Society; CSAT; National Advocacy Platform; NGO Gender Coordination Network; Civil Society Coalition on Accountability and Transparency (SOCAT); MHRRC; and HRDC issued a joint press statement titled: *The arrest and ill-treatment of the ACB Director General* dated 6th December 2022, in which they said that they were deeply concerned about the arrest of the ACB Director General.
- (ii) The National Anti-Corruption Alliance issued a press statement on ACB Director General in which they expressed deep concern on the arrest.
- (iii) The ECM issued a press statement on *the arrest of the ACB Director General* expressing the frustration and concerns surrounding the arrest of the ACB Director General.

On 6th December, 2022, the Embassy of United States of America issued a statement *on the Arrest of the ACB Director General*. The Embassy condemned the arrest and that she was arrested at night and driven 48 kilometres away from Lilongwe to Namitete Police Post. They wrote that ‘the arrest was irregular’.

In addition, her testimony to the Commission, the DG of ACB indicated that after her release, she was invited to the US Ambassador’s Residence and thereafter spent some time at the US Embassy.

4.5 The release of the Director General of ACB

The Minister of Justice announced in Parliament that the DG of ACB was released on the same day she was arrested on 6th December 2022. The Commission received testimony that when the DG of ACB was released she left Namitete Police Post in her official Government vehicle and was driven by her designated driver.

4.6 Circumstances of the release of the Director General of ACB

The DG of ACB was released on Police bail and was required to be reporting to Police for bail. She was due to report to the Police on Monday 12th December 2022. However, on the stated date, the Police informed her, through her lawyer, not to report for bail until further notice.

4.7 The Procedure on the release of the Director General of ACB

The Police recorded a caution statement from the DG at Namitete Police Post and granted her police bail.

4.8 Status of the Case

The Minister of Justice informed the Commission that the case had been withdrawn unconditionally. The Attorney General informed the Commission that the case was at complaint stage, even though in his letter to the Speaker of the National Assembly he stated that Dr. Kayuni had withdrawn his complaint. The Inspector General of Police reported to the Commission that the case was stale, and while the record of the case would be preserved, no further action would be taken. The Deputy Inspector General of Police responsible for Administration informed the Commission that the case was “*still live*” and that if instructed the Police would call back the DG of ACB. The complainant Dr. Steven Kayuni informed the Commission that he had no reason to believe he would withdraw the complaint. The lawyer for the DG of ACB informed the Commission that she had written the Minister of Justice for evidence in writing that the case had been withdrawn. At the time of testifying before the Commission she had not received a response.

CHAPTER 5

5.0 THE CONDUCT OF THE MALAWI POLICE SERVICE

5.1 In the events leading to the Arrest

The evidence before the Commission revealed that the Malawi Police Service (MPS) conduct in the events leading to the arrest of the DG of ACB had a number of gaps in terms of how the process was conducted from the receipt of the complaint to the time of executing the arrest was handled. The testimonies received by the Commission on how the actual arrest was planned and executed reveal the following:-

- a) The procedure used to make a complaint; the usual format for presenting complaints at a Police Station was not followed;
 - i. The complaint was not dated;
 - ii. The Receiving Officer did not interrogate the complainant to get full particulars around the complaint;
 - iii. The Officer who received the complaint did not sign anywhere or indicate his name, the date the complaint was received or place where the complaint was lodged;
 - iv. The complaint bore an electronic signature when in fact it was printed and handed over to the Police in person by the complainant;
- b) The complaint was lodged at Police Headquarters during odd hours when offices were closed;
- c) The complaint was received on Saturday, 3rd December, 2022, yet the Recording Officer kept the complaint until Monday, 5th December, 2022. He indicated that the Director of CID who was in France had instructed him to wait until his return.

- d) Although the complaint was received on 3rd December, 2022 it was on Monday, 5th December, 2022 when it was recorded in the Investigation Diary as received;
- e) The planning meeting for the arrest was done before they opened the Investigations Diary;
- f) The case was registered at Lingadzi Police Station on Tuesday the 6th of December 2022 in the evening after the release of the arrested person;
- g) There was no investigation conducted on the complaint. Instead assumptions were made on who the complainant was complaining against. When the complaint was escalated to the Deputy Inspector General of Police responsible for Administration, senior officers went into planning for arrest;
- h) The Warrant of Arrest indicated that they did not have full particulars of the DG of ACB Ms Martha Chizuma. However, the Investigations Diary had full particulars including her date of birth. The Officer indicated that he obtained the particulars of Ms Martha Chizuma from other records outside the complaint;
- i) The Police proceeded to arrest the DG of ACB following their understanding of the High Court ruling by Justice Anabel Mtalimanja on the Criminal Review on the leaked audio. The Police were largely influenced by the public violent reaction that occurred when the DG of ACB was summoned by the Police for interrogation previously;
- j) Failure to inform the superiors of the ACB's DG on the impending arrest in line with Service Standing Order 283 of MPS;

- k) The testimony from some Police witnesses acknowledged that some formalities were not complied with.

5.2 During the Arrest

- a) Nineteen (19) Police officers were deployed to arrest the ACB Director General;
- b) The Police did not deploy female CID Officers during the operation. The Female Officers used during the arrest were taken from the Police Mobile Service team and were not briefed on what to do during the arrest. Through CCTV footage the Commission had sight of a female officer being manhandled by a Senior Male Officer and accidentally bumped into the DG of ACB.
- c) No information was given to the DG of ACB on where she was being taken to, at the time she was arrested at her house.

5.3 After the Arrest

- a) The DG of ACB was not informed of where she was being taken to, until she left the house and they had exited the Presidential Villa's gate;
- b) The Commission was informed by the Police in their testimony that the decision to take the DG of ACB to a Police formation far away from her place of residence was influenced by the public reaction from the previous event where the DG of ACB had been summoned to the Police National Headquarters.
- c) The DG of ACB was granted Police Bail.
- d) There was no official document conveying the unconditional release of the ACB Director General.
- e) Charges have not yet been dropped against the DG of ACB. The Police are treating the matter as private prosecution and not public

prosecution by giving prominence to the complainant to withdrawal the complaint.

CHAPTER 6

6.0 SUSPENSION OF THE DIRECTOR OF PUBLIC PROSECUTIONS

6.1 Announcement.

The Suspension of the Director of Public Prosecutions (DPP) was first known to the public through the statement that the Minister of Justice, Honourable Titus Mvalo SC made on Tuesday, 6th December, 2022 in Parliament. The Parliamentary proceedings from the Hansard 17 of Tuesday, 6th December, 2022 indicate that the Minister of Justice informed the House that: *“Government proceeded to get to the bottom of this issue and as a result, the Director of Public Prosecutions has been suspended from his duties with immediate effect pending further inquiry.”*

According to Hansard 17, the Minister subsequently, took a question related to the suspension of the DPP on the same day. The question was from Member of Parliament from Rumphu East, Honourable Kamlepo Kalua who was seeking clarity as to whether the DPP had been suspended or dismissed. The Minister of Justice in his response confirmed that the DPP had been suspended and that *“it was not unusual to suspend an employee pending investigations.”*

6.2 The Process.

When the DPP appeared before the Commission on Wednesday, 21st December, 2022, he confirmed that he was suspended but had not received the suspension letter.

In her testimony to the Commission of Inquiry on Wednesday, 28th December, 2022, the Secretary to the President and Cabinet (SPC) submitted that there was an internal Memorandum from the Solicitor General to the Office of the President and Cabinet (OPC) dated 14th

December, 2022. In this Memorandum, the Solicitor General and Secretary for Justice was requesting the Secretary to the President and Cabinet to formally regularize the suspension of Dr. Steven William Kayuni, Director of Public Prosecutions, in accordance with Public Service protocols. The Memorandum further requested the Secretary to the President and Cabinet to *“base the suspension on the alleged abuse of office by the Director of Public Prosecutions which led to the arrest of the Director General of the ACB, Ms. Martha Chizuma on 6th December, 2022.”*

The SPC further submitted that the letter of suspension of the DPP was issued on 22nd December, 2022 and was signed by Dr Janet Banda, SC, Deputy Secretary to the President and Cabinet on behalf of the SPC. The suspension letter issued to the DPP by the OPC was based on Sections 101 and 102 of the Constitution, as read with section 32 of the General Interpretation Act (Cap:1:01).

The SPC informed the Commission that she had established that there was no Memorandum deployed to His Excellency The President on the suspension of the DPP in line with the expected Government Protocol. The SPC informed the Commission that in her opinion, the absence of the Memorandum to the President caused her to doubt the validity of the letter of suspension of the DPP.

CHAPTER 7

7.0 THE LEAKED AUDIO

The Commission observed that the leaked audio came into mass circulation on 22nd January, 2022. Apart from the acknowledgement by the DG of ACB that she was the other party to the conversation in the audio, in the Presidential statement of 24th January, 2022; she also confirmed before the Commission that the other voice in the audio was hers. The Commission was informed that the leaked audio started in the middle and that she was talking to a Mr Anderson Mwakyelu, who at the time of the recording was working with the Department of Accountant General and the DG of ACB had been collaborating with him in her previous role as the Ombudsman. Mr Mwakyelu is also known to the NIS as a person of interest.

The audio raises issues of rights of all the parties that might have been affected; the persons, officers, offices and institutions mentioned therein and all persons having the conversation.

After listening to the testimony of several witnesses the Commission made the following observations:-

7.1 The Constitution

- a) It was alleged that the audio was made and released without the consent and authority of the DG of ACB. This potentially was interference with her private communication in violation of Section 21(c) of the Constitution which provides that: *“every person shall have the right to personal privacy, which shall include the right not to be subjected to interference with private, communications, including mail and all forms of telecommunications.”*

- b) For those that may be injured by the audio, it raises issues of access to justice and effective remedy under Section 41 of the Constitution.
- c) Since there are competing and conflicting rights, there must be an assessment of the limitation of rights, as provided in Section 44 of the Constitution.

7.2 Law of Evidence

Evidence obtained in violation of another person's constitutional rights, direct or even indirectly, is illegally obtained. Such evidence may only be admissible at the discretion of the Court.

7.3 Penal Code

- a) The charge that Malawi Police Service (MPS) proffered against the DG of ACB under Section 113(1) (d) of the Penal Code reads as follows: "*any person who- (d) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceedings or capable of prejudicing any person in favour of or against any parties to such proceedings, or calculated to lower the authority of any such person before whom such proceedings is being had or taken; or.*" This paragraph begs the question whether Dr. Steven William Kayuni or the Director of Public Prosecutions is a party to any proceedings or is a person before whom such proceedings are being undertaken or had.
- b) In respect of the person or persons who leaked the audio, the offence of libel under Section 200 of the Penal Code may be proffered.

7.4 Corrupt Practices Act

Unauthorized disclosure of information by an employee of the ACB is an offence under Section 49B or Regulation 4 of the Corrupt Practices Act, and Corrupt Practices (Oath of Secrecy) Regulations. However,

prosecution for any violation of these provisions will have to be considered in light of constitutional rights, illegally obtained evidence and the position of whistle blower and informants at law and under the Corrupt Practices Act Section 51A.

7.5 Court Decisions

Courts have made several decisions on the issue of leaked audio which were brought by third parties. In effect, the Courts dismissed applications by third parties.

The judgment of Justice Mtalimanja in the case of **Martha Chizuma v The Republic and Frighton Phompo** (Interested Party) Miscellaneous Civil Cause No. 8 of 2022, High Court, Lilongwe District Registry summarized the position at law. In the ruling the Court held the view that the persons that brought the matter of the leaked audio were not proper parties to complain and preferred that the State should take responsibility to determine the rights of all concerned. In Paragraph 177, the Judge ruled that there was forum shopping and abuse of the court process. The court set aside the order directing the Director of CID of the Malawi Police Service to investigate the authenticity of the audio.

That however, was not the end of the matter. In Paragraph 178, the court ruled as follows:-

“If the State deems that there is sufficient cause to commence criminal proceedings against the Applicant, let the DPP institute and undertake the same as prescribed by law, accordingly.”

It is the understanding of this Commission of the ruling of Justice Mtalimanja, does not close the matter. The ruling enjoins the State to investigate and if the State deems that there is sufficient cause for criminal

proceedings, taking into account the legal issues raised above, then the DPP, as an institution, should institute and undertake proceedings on behalf of individuals, institutions and the State that may have been injured by the leaked audio.

7.6 Civil Actions

The leaked audio may have injured private rights. Civil suits would not come under the realm of the ruling in the case cited above. However, they would be subjected to the legal challenges explained above.

CHAPTER 8

8.0 KEY FINDINGS

The Terms of Reference of the Commission were to investigate whether, and to what extent the arrest and limitation of the Director General of ACB was arbitrary and unlawful.

ToR 1. Whether the police received a criminal complaint against the Head of ACB, whether such a complaint was valid and whether upon receipt of such complaint the Police acted in accordance with the law;

Findings on:-

Whether the police received a criminal complaint against the Head of ACB, whether such a complaint was valid

The evidence before the Commission is that there was a complaint against the DG of ACB. The complaint was lodged on Saturday 3rd of December 2022 by Dr. Steven William Kayuni at National Police Headquarters CID Offices. The complaint was received by Senior Superintendent Henry Willy Kalungu.

The complainant submitted to the Commission that he lodged the complaint between 11:00 am and 1:00 pm on Saturday, 3rd December 2022, while the recipient of the complaint Senior Superintendent Kalungu submitted to the Commission that he received the complaint after working hours when he was alone in his office studying. The National Police Headquarters closes at 12 noon on Saturdays.

- i. The Commission finds that the complaint was lodged on Saturday 3rd December 2022 after working hours.**
- ii. It is Commission's finding that although Senior Superintendent Kalungu received the complaint after the National Police**

Headquarters office working hours, he was however within the precincts, therefore, it was competent for him to receive a complaint from a member of the public.

The evidence before the Commission shows that the formalities for recording a witness statement during the lodging of the complaint were not compliant with Malawi Police Service Standing Order 259.

iii. The Commission finds that even though the formalities in form and content of the complaint did not comply with Standing Order 259, the complaint was still valid at law.

The evidence before the Commission shows that in the complaint statement the complainant stated that “... *I believe whatever was in that clip is something that is tantamount to breach of not only legal ethics as a lawyer and confidentiality, breach of Corrupt Practices Act and utterly criminal libel*”. Further, Dr. Steven William Kayuni told the Solicitor General that he opted to file for criminal libel than bringing the civil suit.

iv. The Commission finds that the complainant laid a criminal complaint before the Police.

Findings on:-

Whether upon receipt of such complaint the police acted in accordance with the law;

Upon Receipt of the Complaint

The evidence before the Commission shows that upon receipt of the complaint, and while the complainant’s statement referred to an ACB Officer in the leaked audio, the Police did not carry out an investigation on the complaint. Instead, assumptions were made on who the complainant was complaining against. When the complaint was escalated to the

Deputy Inspector General of Police responsible for Administration, senior officers went into planning for the arrest.

- v. The Commission finds that there was no investigation as there is no investigation report, and that the particulars of the person arrested were imported from another source and not from the complaint.**
- vi. The Commission finds that the absence of an investigation report in this particular case, is inconsistent with the obligation placed on the Police in line with Malawi Police Service Standing Order 245.**

In effecting the Arrest

In planning the arrest of the DG of ACB on 6th December 2022, the evidence before the Commission reveals that the Police used antecedent information on the violent public reaction when the Police had previously invited the ACB DG for questioning on the leaked audio on 22nd April 2022 .

- vii. The Commission finds that the show of force by the Police was excessive considering the nature of the offence, the high public profile of the office held by the person to be arrested, the secured location of the residence of the DG of ACB, the time of the arrest, and the distant location of the Police Post where she was taken to for custody.**

In release of the arrested person

The evidence received by the Commission shows that there was a Presidential directive to release the DG ACB unconditionally. However, the Police went on to caution the DG of ACB before releasing her on

Police Bail. She was due to report for bail on Monday 12th December 2022 but was advised not to report until further notice.

viii. The Commission finds that the Presidential directive on the unconditional release was not complied with by the Police.

ToR 2. Whether the Director of Public Prosecutions (DPP) in his personal capacity, was entitled to lay a complaint against the Head of ACB, in the alternative whether filing such a complaint was tantamount to an abuse of his office. By extension to establish the legality of withdrawal of the charge.

Finding on:-

Whether the Director of Public Prosecutions (DPP) in his personal capacity, was entitled to lay a complaint against the Head of ACB

The evidence before the Commission showed that the complainant lodged his complaint in his personal capacity.

i. The Commission finds that Dr Steven William Kayuni had the right to lodge a complaint as a citizen in line with Section 41 of the Constitution which states that:

- a. Every Person shall have a right to recognition as a person before the law.*
- b. Every person shall have the right of access to any court of law or tribunal with jurisdiction for final settlement of legal issues*
- c. Every person shall have the right to an affective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law.*

Evidence further shows that the complaint he lodged is in respect to his duties as Director of Public Prosecutions. In his statement Dr Steven Kayuni states that “...I have always been seriously concerned with the

January 2022 audio tape, where my name as DPP was mentioned a number of times and portrayed as corrupt and compromised... my job involves giving guidance or directions on numerous cases. This is my role in public service.”

ii. The Commission finds that Dr. Steven William Kayuni was and is not entitled to bring a personal complaint based on issues pertaining to the office of the DPP.

iii. The Commission finds that while Dr. Steven William Kayuni as the DPP represented the State in the criminal review case before Justice Mtalimanja, he was conflicted when he decided to lodge a complaint in his personal capacity to the exclusion of others whose rights may have been injured by the leaked audio.

In the alternative whether filing such a complaint was tantamount to an abuse of his office. By extension to establish the legality of withdrawal of the charge.

Finding:-

iv. The Commission finds that Dr. Steven William Kayuni the DPP, demonstrated lack of sound judgement by prioritising his self-interest over the responsibility of his office in relation to the leaked audio.

Evidence before the Commission indicates that there was a warrant of arrest issued by a Magistrate on Monday 5th December 2022 but the matter was not taken to court. Further, the nature in which the complaint was lodged makes it a matter for public prosecution and not private prosecution. Therefore the authority over the case rests with the State not the complainant.

v. The Commission finds that in the circumstances there was no case that could be withdrawn before the court. Therefore, the issue of legality of withdrawal of the charge does not arise.

ToR 3. Whether on the facts available there existed reasonable grounds to suspect that the Director General of ACB had committed an offence;

Finding on:-

Whether on the facts available there existed reasonable grounds to suspect that the Director General of ACB had committed an offence

The Commission has evidence that on 22nd January 2022 the DG of ACB had a private telephone conversation with a third party whose identity the Commission has established as Mr Anderson Mwakyelu. In the conversation, they discussed matters surrounding corruption cases that the ACB is pursuing. The conversation makes reference to individuals, public officers, public and private institutions. In the conversation, the DG of ACB makes corruption allegations against individuals, public officers, public and private institutions.

I. The Commission finds that there exist reasonable grounds to suspect that the Director General of ACB committed offences.

ToR 4. Whether the rights of the Head of ACB as an arrested person were respected or not.

Finding on:-

Whether the rights of the Head of ACB as an arrested person were respected or not.

The Commission has evidence which indicates that the Police used a show of excessive force on arrest, that they did not inform the DG of ACB when being arrested where she was being taken to; and that the Police knowing that they would be arresting a female did not make arrangements for female detectives and had to improvise with lady officers from the Police Mobile Services who were originally part of the house cordoning team and appeared not to have been briefed on the conduct of the arrest in the house.

i. The Commission finds that other than the show of excessive force and not informing the DG of ACB on arrest where she was being taken to, the rights of the Director General of ACB as an arrested person were respected.

ii. The Commission finds that the DG of ACB was not manhandled, tortured or disrespected by the Police.

iii. The Commission finds that some of the statements made in Parliament on the conduct of the Police in handling the DG of ACB during her arrest were inaccurate and exaggerated.

ToR 5. Whether the law provides for the suspension of a DPP and if so whether in the instant case there were valid reasons for the suspension of the DPP;

Finding on:-

Whether the law provides for the suspension of a DPP and if so whether in the instant case there were valid reasons for the suspension of the DPP;

The Commission has evidence that the Minister of Justice announced the suspension of the Director of Public Prosecutions in Parliament on Tuesday 6th December 2022. And further, the Director of Public Prosecutions Dr. Steven William Kayuni confirmed his suspension to the Commission in his testimony. The Commission considered the letter from OPC on the suspension.

i. The Commission finds that the law provides for the suspension of a DPP in Section 32 of the General Interpretations Act (Cap. 1:01) of the Laws of Malawi. Even though the power to appoint is subject to confirmation by Parliament, the power to suspend or remove the DPP from office by the President is not subject to any other authority. Therefore, the President can suspend the DPP without any recommendation from any other authority. The Commission finds that the suspension was meant to pave way for investigations by this Commission.

ToR 6. Whether in light of the High Court judgement regarding the leaked audio tape of the ACB Director General and given the need to preserve the reputation of the ACB, the matter of the leaked audio tape should, in the public interest, be referred for investigation;

Finding on:-

Whether in light of the High Court judgement regarding the leaked audio tape of the ACB Director General and given the need to preserve the reputation of the ACB, the matter of the leaked audio tape should, in the public interest, be referred for investigation;

The Commission received evidence of court rulings resting with the decision of Justice Mtalimanja of 30th September 2022 in which the court ruled that: *“if the State deems that there is sufficient cause to commence criminal proceedings against the applicant, let the DPP institute and undertake the same as prescribed by law, accordingly.”*

i. The Commission therefore finds that the State has an obligation to respect the decision of the court in view of the various rights of the people that may have been injured by the corruption allegations in the leaked audio and in order to preserve the reputation of the ACB.

ANCILLARY MATTER

The Commission was informed that the SG was aware that two weeks prior to the arrest of the DG of ACB, the ACB had instituted investigations into the alleged unaccounted for travel allowances the DPP had claimed for a failed official trip to Vienna, Austria in June 2021. The amount in question is MK5, 512, 500. 00. The DPP submitted documentary evidence dated 30th June 2021 to the Commission which indicates that upon return from the failed trip, he offered to repay the allowances. The Commission

has received evidence that the DPP repaid the sum of K3, 543, 750.00 on 1st December 2022.

Finding on the Ancillary Matter:-

i. The Commission finding is that the matter is under investigation by the ACB

CHAPTER 9

9.0 RECOMMENDATIONS

ToR 7. To make necessary recommendations to the President, the office of the DPP, the office of the ACB, the Police and other relevant authorities

To The President

1. The Commission finds that there exist reasonable grounds to suspect that the Director General of ACB committed offences and that she demonstrated lack of sound judgement in the leaked audio.

The Commission recommends that appropriate action be taken to deal with the conduct of the DG of the ACB in so far as the leaked audio is concerned.

2. The evidence before the Commission shows that there are serious mistrust issues among the different offices that are mandated to fight corruption. The DG of ACB pointed out to receiving pressure against prosecution of some corruption cases and non-cooperation from offices that are supposed to support the ACB.

On the other hand, the DPP and the AG testified to the Commission that they had challenges with the manner in which the DG of ACB was handling confidential information and exposing sensitive information to third parties, and the lack of collaboration from the DG of ACB on some cases e.g. the *Cement-gate*. The Commission's view is that the leaked audio creates the impression that the DG of ACB does not trust anyone, including but not limited to the judiciary, media, civil society, private and public officers in the fight against corruption.

Through the evidence before the Commission it is apparent that corruption exists in the country and creates a very difficult environment to work in. The Commission deduced that the DG of ACB displayed a sense of being isolated however, it was also evident that in her commitment to fight against corruption, she has not been able to carry along the critical offices that she needs to fight corruption. Consequently she appears to be working alone and the fight against corruption has been compromised.

The Commission recommends that urgent action be taken to restore the dignity, integrity and trust of the offices that are involved in tackling corruption. Further; the Commission recommends reorganisation of the leadership in the government offices responsible in the fight against corruption. Furthermore; the ACB, the DPP, the AG, and the Judiciary should collaborate to complete prosecution of the major corruption cases to restore public confidence in the fight against corruption.

3. The Commission found that Dr. Steven William Kayuni was not entitled to bring a personal complaint based on issues pertaining to his office as DPP.

The Commission finds that while Dr. Steven William Kayuni as the DPP represented the State in the case of review before Justice Mtalimanja, he was conflicted when he decided to lodge a complaint in his personal capacity to the exclusion of any others whose rights may have been injured by the leaked audio.

The Commission finds that Dr Steven William Kayuni the DPP, demonstrated lack of sound judgement by prioritising his self-interest over the responsibility of his office in relation to the leaked audio.

The Commission recommends that appropriate action be taken to deal with the conduct of the DPP in this matter.

The Commission found that the DPP has not been proactive in recusing himself where there was potential conflict of interest.

The Commission recommends that the Code of conduct for Prosecutors in Malawi, the Corrupt Practices Act, and the Malawi Law Society Code of Ethics be adhered to at all times.

4. The evidence before the Commission revealed that institutions of the Police, the DPP, the ACB, and the AG are independent consistent with the Constitution. Although it is functional independence, the Commission found that, in practice, this has been taken to mean absolute independence and almost creating anarchy. This has created disconnect in the interdependence of the Government systems.

The Commission recommends re-orientation of functional independence of MDAs and critical aspects of the interdependence of the Government systems.

5. The evidence before the Commission shows that critical members of the Executive were aware of the arrest before Parliament business of Tuesday 6th of December 2022 commenced. Further, the Commission received testimony that the Government side had a caucus at Parliament before the Parliament business had started. Further evidence shows that the issue of the arrest of the DG of ACB in the House was prompted by the Opposition side, and it took some time before the Government side brought an official statement on the arrest of the DG of ACB. The delay in the issuance of the Government statement resulted in suspension of proceedings of the House on more than one occasion.

The Commission recommends that Government side should be proactive and take control in times of crisis.

6. The Commission received evidence that the working relationship among the three offices of the DG of ACB, AG and the DPP is not cordial. The relationship between the DG of ACB and the DPP is that of animosity and mistrust. According to the evidence, this started with the Sattar case. This animosity has continued in spite of the efforts by the Minister of Justice to mend the differences. This poor working relationship has jeopardized the operations of both offices, and undermined the integrity of both. This has negatively affected the nation's pursuit to fight corruption.

The Commission recommends that for the good of the nation and the success of the anti-corruption drive, and for the reinstatement of public trust and the integrity of the two offices; consideration should be made to urgently find a permanent solution to the stalemate.

The Office of the President and Cabinet

1. The testimony revealed that some formalities for action and record keeping were not complied with as should have been the case. In the case of OPC, there were time lapses in formalising the suspension of the DPP after the Minister of Justice announced the decision in Parliament on Wednesday, 7th December 2022. When the DPP testified to the Commission on 21st December 2022, he had not yet received his letter of suspension.

The Commission received evidence that the President made a directive on the unconditional release of the DG of ACB in the morning of 6th December, 2022. Through testimonies from various witnesses, it was evident that there was no written instruction from the relevant Government Ministries to formalise the directive.

The Commission recommends that the officers responsible for signifying oral directives from the President or Ministers must do so at the earliest opportunity to avoid communication and decision vacuum.

Office of the ACB

1. The Commission received evidence that shows the ACB is isolated. As a result, it reduces its effectiveness as the driver of the anti-corruption agenda.

The Commission, therefore, recommends that the ACB should rebuild and reinforce partnerships with other law enforcement institutions on matters pertaining to corruption.

2. The Commission received evidence of common leakage of information from the ACB to third parties, as a result it negatively affects the operations and integrity of the institution.

The Commission recommends that employees that unlawfully disclose information must be investigated and disciplined and further recommends that official information should be released through the ACB's Public Relations Office.

3. The Commission received evidence that the agreement for mutual legal assistance between the ACB and the National Crimes Agency of the UK did not follow the government framework on bilateral agreement, and this is straining relationships and could be a cause for some of the mistrust in the sector.

The Commission recommends that without jeopardising the independence of the ACB, any bilateral agreements for support to the Bureau should have the Malawi Government as a party.

Office of the DPP

1. The evidence before the Commission revealed that while acknowledging the independence of the office of the DPP, there was no formal coordination on procedures regarding some of the DPP external travels, and his leave entitlements. For instance, the DPP proceeded on leave and went out of the country without completion of the required leave formalities between the Ministry of Justice and the OPC. As a result, when the arrest of the DG of ACB occurred no one knew that the DPP was out of the country.

The Commission recommends that senior officers should adhere to administrative formalities for proceeding on leave or private external travel given the critical nature of their duties.

2. The Commission received evidence from the DPP, Dr Steven Kayuni, that he had received over 400 threatening calls and texts associated with his official duties and none of them was reported to the Police.

The Commission recommends that given the sensitive nature of the office of the DPP and the security of the office holder, it is important for any security threats to be reported to the national security agencies.

The Police

1. The evidence before the Commission shows that other than officers involved in the planning for the arrest, no other authority had prior information of the arrest of such a high profile office holder.

The MPS Standing Order 283 states that *“When it is necessary, to effect or cause the arrest of a person in the employ of Government, the head of such person’s department or the senior member of the department in the district should be informed without delay. Where practicable time should be given to enable the person to be relieved of his duties prior to his arrest (see S.S.O. 303 – reportable cases D.M.I.R..”*. Minister of Justice, the line Minister for the DG of ACB was not informed.

The Commission therefore recommends that Police complies with the Standing Order 283. The Commission takes the view that compliance with Standing Order 283 does not amount to seeking approval.

2. The evidence before the Commission shows the Police did not keep records for the planning meetings of the operation and neither did they have records of the operational order for the arrest. The Police testified that the records were not written and kept, in order to safeguard against leakage of information. In this case, it was evident that the centre of authority was displaced and there was serious lack of accountability on actions taken.

The Commission recommends that the issue of leakage should be dealt with separately as a disciplinary issue instead of compromising the integrity of the Malawi Police Service as an institution of records.

3. The evidence obtained by the Commission shows that the Malawi Police Service Standing Orders do not provide for conducting of raids. The only available guidelines are in the notes for CID Intake Course.

The Commission recommends that the Malawi Police Service should incorporate procedures for conducting raids and ambushes in the Standing Orders.

4. The Commission received evidence that the MPS has developed a collective leadership style on decision making. This style obtained during the planning of the arrest of the DG of ACB. The evidence shows that this left no clear line of accountability on decisions taken.

While the Commission commends this development on shared leadership, it however recommends that even in such cases, the most senior officer must take responsibility for the decisions taken.

5. The evidence before the Commission shows that there is inadequate adherence of record keeping in the Police Service due to use of improvised record keeping documents. This affects proper capturing of information on records in a consistent and standardised manner across the Service.

The Commission recommends that the Malawi Police Service uses standardised record keeping stationery as provided for in the Service Standing Orders 505 to 527.

6. The evidence shows that some officers that should have been involved in the decision making processes on the arrest of the DG of ACB were bypassed because they were recently appointed to their positions. This created the impression that the operation could have been pre-arranged.

The Commission recommends that rank and hierarchy should be respected to avoid the impression of partiality, exclusion and comradeship in the Service.

7. The evidence before the Commission is that the Malawi Police Service Management did not hold an immediate debriefing and a post mortem meeting after the operation involving the arrest of the DG of

ACB in order to review what was done right and what was done wrong during the operation following the public reaction and interest the matter had generated in Parliament. This deprived the Malawi Police Service of lessons that would have been learnt.

The Commission recommends that whenever the MPS conduct such operations of public interest that generate sensitivities, debriefing and post-mortem meetings must be held with urgency for accountability and to generate lessons that can enhance their professionalism.

Other Relevant Authorities

Parliament

1. The evidence before the Commission revealed that some pronouncements in the House were based on social media as a source, some of these pronouncements were inaccurate and exaggerated. Some pronouncements created panic and disillusionment among citizens, and disruptions to Parliamentary proceedings. This could potentially incite violence.

The Commission appreciates that social media has become an important source of information. However, the Commission recommends that for Parliament, information obtained from social media should be carefully verified and triangulated before any pronouncements are made in the House, considering that Parliament is an arm of Government.

Office of the Attorney General

1. The Commission received evidence of court rulings resting with the decision of Justice Mtalimanja of 30th September 2022 in which the court ruled that *“if the State deems that there is sufficient cause to commence criminal proceedings against the applicant, let the DPP institute and undertake the same as prescribed by law, accordingly.”*

The Commission recommends that the State respects the decision of the court in view of the various rights of the people that may be injured by the corruption allegations in the leaked audio.