MALAWI HUMAN RIGHTS COMMISSION

AN INVESTIGATION INTO THE SHOOTING AND DEATH OF CHIKONDI MAKAWA AT THE GATEWAY MALL IN LILONGWE

AUGUST, 2022
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EXECUTIVE SUMMARY

1.0 Introduction

This report provides the processes, findings and recommendations of the investigation that the Malawi Human Rights Commission conducted in Lilongwe in August and September 2022.

2.0 Background

On Tuesday 9th August, 2022 the Malawi Human Rights Commission (hereinafter referred to as “the Commission”) received a complaint from Mphatso Makawa (herein referred as a complainant). Mphatso Makawa alleged that his brother Chikondi Makawa (herein referred as a deceased) was shot dead by a police officer at Acres Bar at the Gateway Mall in Lilongwe on 7th August 2022. He said that the deceased was the lastborn in their family and unmarried. The deceased was staying with his mother at Area 49 Gulliver. He further stated that the deceased had a mental problem known as bipolar disorder which was diagnosed in 2020 and had been taking medication.

The Commission conducted an investigation into the shooting and has concluded the investigation. This report contains the findings of the investigation and recommendations to relevant stakeholders.

3.0 Mandate of the Commission

The Commission is a national human rights institution (NHRI) established under chapter XI of the Constitution of the Republic of Malawi (The Constitution). The Commission is mandated to promote and protect human rights in the broadest sense possible and to investigate violations of human rights on its own motion or upon complaints received from any person, class of persons or body. The Commission is further regulated by the Human Rights Commission Act, (Cap 3:08) with regard to its powers, functions, duties, responsibilities and operations.

4.0 Human Rights Issues

The allegations in this matter raise prima facie violations of the following rights:

a) Right to human dignity and 
b) Right to Life
a) **Right to human dignity**

The Constitution in Section 19 (2) states that:

> In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed. (3) No person shall be subjected to torture of any kind or to cruel, inhuman or degrading treatment or punishment. (4) No person shall be subject to corporal punishment or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

In addition, regional and international human rights instruments also protect the right to human dignity and prohibit any form of torture and degrading treatment. These instruments include the Universal Declaration on Human Rights (UDHR) in article 5, the International Covenant on Civil and Political Rights (ICCPR) under article 7; and the African Charter on Human and Peoples Rights (ACHPR) under article 5.

b) **Right to life**

The Constitution in Section 16 states that:

> “Every person has the right to life and no person shall be arbitrarily deprived of his or her life: Provided that the execution of the death sentence imposed by a competent court on a person in respect of a criminal offence under the laws of Malawi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her right to life.”

The right to life and right to liberty are pre-requisite for the enjoyment by other rights, and according to Section 45 of the Constitution, these rights cannot be derogated.

In addition, regional and international human rights instruments also enshrine the right to life and prohibit arbitrary deprivation of life. These instruments include the Universal Declaration on Human Rights (UDHR) article 3, the International Covenant on Civil and Political Rights (ICCPR) under article 6; and the African Charter on Human and Peoples Rights (ACHPR) under article 4.

The African Commission on Human and Peoples Rights (ACHPR) held that any violation to the right to life without due process amounts to arbitrary deprivation of life (Forum of Conscience vs. Sierra Leone, Communication 223/98).
5.0 Purpose of the investigation
   a) To establish circumstances leading to the shooting of the deceased;
   b) To establish the medical condition of the deceased;
   c) To find out whether the police officer acted according to the law or not;

6.0 Methodology

The investigation was conducted through in-depth interviews, examination of scene, analysis of video footage, review of documents, laws and reports. The Commission visited the scene of crime at Gateway Mall and watched and analyzed the CCTV footage of the incident outside Acres Bar.

7.0 Findings

7.1 Based on the facts and evidence gathered during the investigation, as well as the legal analysis, the Commission has come up with the following findings:

7.1.1 THAT the deceased, aged 36, was living with his mother at Area 49, Gulliver in Lilongwe and was a gym trainer by profession.

7.1.2 THAT the deceased had a mental health problem. This is based on the evidence from the brother to the deceased and the medical report from St. Johns of God Hospital Services.

7.1.3 THAT the medical report stated that there was a positive family history of mental illness. During the early days of admission at the clinic he exhibited the following: talkativeness, overfamiliarity, elated mood, psychomotor agitation and flight of ideas.

7.1.4 THAT on the day of his death, the deceased became aggressive and violent. The complainant (deceased’s brother) testified to this and the CCTV footage showed the same as well as the testimonies of the bartenders.

7.1.5 THAT the CCTV recorded that around 10 p.m. the deceased was seen at Gateway Mall premises where he visited Acres Bar.

7.1.6 THAT upon entering Acres Bar, the deceased ordered a bottle of water but he did not pay for it.

7.1.7 THAT when bartender Malunga followed the deceased and asked him about payment for the water bottle, the deceased reacted violently and roughed up the bartender.

7.1.8 THAT police officer David Chitsike arrived at Acres Bar whilst carrying a rifle in the company of the guard. No other police officer accompanied him.

7.1.9 THAT Chitsike calmed down the deceased for some minutes and tried to reason with him.
7.1.10 THAT the deceased beat up the Chitsike who fell down together with his riffle and the deceased struggled with him to confiscate the riffle.

7.1.11 That the Deceased provoked bar tenders at acres bar and officer Chitsike.

7.1.12 THAT the deceased was overpowered by the security guards who joined the fracas to help Chitsike

7.1.13 THAT the deceased hid under the counter of the bar where the bar attendant Bandawe went in to protect the bar materials and money.

7.1.14 THAT Chitsike threatened to shoot the deceased and the deceased surrendered his arms in the air begging Chitsike not to shoot him

7.1.15 THAT the deceased used Bandawe as a shield for him not to be shot by Chitseka

7.1.16 THAT despite the pleas from the deceased Chitsike shot at and killed the deceased from a distance of about two metres.

7.1.17 THAT Chitsike was arrested, charged with murder and is remanded at Maula Prison pending trial.

7.1.18 THAT according to the postmortem examination which was conducted on 11th August, 2022 at KCH by Malmed Healthcare Services, (Attachment # 1) the deceased died of unnatural death from gunshot wounds and the bullet was retrieved from his body.

7.1.19 THAT the postmortem report further stated that the deceased was shot from an oblique angle with barrel of the gun pointing downwards at him; not a common accidental scuffle related shooting situation.

8.0 RECOMMENDATIONS

Pursuant to the powers conferred on it by Section 130 of the Constitution and Section 22 of the Human Rights Commission Act, the Commission makes the following recommendations:

9.1 Malawi Police Service

9.1.1 The Malawi Police Service must expeditiously conclude criminal investigations into the death of the deceased.
9.1.2 Depending on the outcome of the criminal investigation of Police Officer Chitsike, the Director of Public Prosecutions should ensure timely prosecution of the case to ensure that justice is served for both the family of the victim and the perpetrator.

9.1.3 The Malawi Police Service should consider including in the police training curriculum on handling of persons with mental health problems and initiate in-service training on the same for police officers.

9.1.4 Malawi police Service must investigate the conduct of officer Chitsike regarding the allegation that he reported for duties while under the influence of alcohol.

9.2 Ministry of Health

9.2.1 Ministry of Health should increase public awareness on mental health issues and establish helpline for the public to access where a person is with mental health issues need immediate assistance.

9.3 Deceased’s family

9.3.1 The family of the deceased have a right in a civil claim to seek for compensation for loss of life which was arbitrarily taken by Officer Chitsike.

10.0 Conclusion

This report has addressed the human rights issues pertaining to the shooting and subsequent death of Chikondi Makawa. The evidence gathered by the Commission points to the fact that officer Chitsike used unnecessary force to try to contain Mr. Makawa who was mentally incapable at the time, violating his rights in the same vein and contravening the Constitution and international human rights principles and standards.

The report has made recommendations to relevant authorities to take action. The Commission is ready to work with all these authorities and to ensure that the violations of human rights identified in this report are remedied. The Commission will follow up on the progress made on all recommendations in this report by 31st January, 2023.
1. INTRODUCTION

1.1 Background
On Tuesday 9th August, 2022 the Malawi Human Rights Commission (hereinafter referred to as “the Commission”) received a complaint from Mphatso Makawa (herein referred as a complainant). Mphatso Makawa alleged that his brother Chikondi Makawa (herein referred as a deceased) was shot dead by a police officer at Acres Bar at the Gateway Mall in Lilongwe on 7th August 2022. He said that the deceased was the lastborn in their family and unmarried. The deceased was staying with his mother at Area 49 Gulliver. He further stated that the deceased had a mental problem known as bipolar disorder which was diagnosed in 2020 and had been taking medication.

The complainant stated that on 7th August 2022, he went to visit his mother in Area 49. He found his cousin who stayed with his mother who told him that the deceased was back from Zomba where he went for a funeral ceremony for his friend but had become aggressive since his return. The complainant and his family were planning to take him to the hospital for treatment, however this did not go well with the deceased. He accused the complainant of wanting to drag him to the hospital like the way he did last time in November, 2020. He left the house and would occasionally come back, have a talk and leave. On that particular day, the deceased, left home around 8 o’clock in the evening and never came back. His family only received news from the police around 12 midnight that the deceased was at the Lilongwe Police Station. When they went to check on him the following morning (8th August 2022), they were told that he had died and his body was at Kamuzu Central Hospital Mortuary.

1.2 Mandate
The Commission is a national human rights institution (NHRI) established under chapter XI of the Constitution of the Republic of Malawi (The Constitution). The Commission is mandated to promote and protect human rights in the broadest sense possible and to investigate violations of human rights on its own motion or upon complaints received from any person, class of persons or body. The Commission is further regulated by the Human Rights Commission Act, (Cap 3:08) with regard to its powers, functions, duties, responsibilities and operations.
The Commission instituted investigations into shooting and eventual death of the victim due to a number of human rights issues that arose from the shooting incident.

1.3 Human Rights Issues
The allegations in this matter raise prima facie violations of the following rights:

   c) Right to human dignity and
   d) Right to Life

   c) Right to human dignity

The Constitution in Section 19 (2) states that:

   In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed. (3) No person shall be subjected to torture of any kind or to cruel, inhuman or degrading treatment or punishment. (4) No person shall be subject to corporal punishment or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

In addition, regional and international human rights instruments also protect the right to human dignity and prohibit any form of torture and degrading treatment. These instruments include the Universal Declaration on Human Rights (UDHR) in article 5, the International Covenant on Civil and Political Rights (ICCPR) under article 7; and the African Charter on Human and Peoples Rights (ACHPR) under article 5.

   d) Right to life

The Constitution in Section 16 states that:

   “Every person has the right to life and no person shall be arbitrarily deprived of his or her life: Provided that the execution of the death sentence imposed by a competent court on a person in respect of a criminal offence under the laws of Malawi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her right to life.”

The right to life and right to liberty are pre-requisite for the enjoyment by other rights, and according to Section 45 of the Constitution, these rights cannot be derogated.
In addition, regional and international human rights instruments also enshrine the right to life and prohibit arbitrary deprivation of life. These instruments include the Universal Declaration on Human Rights (UDHR) article 3, the International Covenant on Civil and Political Rights (ICCPR) under article 6; and the African Charter on Human and Peoples Rights (ACHPR) under article 4.

The African Commission on Human and Peoples Rights (ACHPR) held that any violation to the right to life without due process amounts to arbitrary deprivation of life (Forum of Conscience vs. Sierra Leone, Communication 223/98).

2.0 OBJECTIVES, METHODOLOGY AND LIMITATIONS

2.1 Objectives
   d) To establish circumstances leading to the shooting of the deceased;
   e) To establish the medical condition of the deceased;
   f) To find out whether the police officer acted according to the law or not;

2.2 Methodology
The investigation was conducted through in-depth interviews, examination of the crime scene, analysis of video footage, review of documents and reports.

2.2.1 The Commission visited the scene of crime at Gateway Mall;
2.2.2 Watched and analyzed the CCTV footage of the incident outside Acres Bar.
2.2.3 The following people were interviewed one-on-one:
   1) Mphatso Makawa (brother to the deceased and the Complainant herein)
   2) Wilson Malunga, Bar Tender at Acres Bar
   3) Station Officer Mwamukiri of Lilongwe Police Station
   4) Mr. Foster Nkhoma (Regional Criminal Investigation Officer)
   5) Mr. Gerald Bandawe, Bar Tender at Acres Bar

2.2.2 Collection and Review of Relevant Documents
The investigation team collected and reviewed relevant laws, policies and guidelines and all the documents obtained during the investigations. These documents include the following:
a) a medical report (Medical Report-Attachment #1)
b) a postmortem report attached herein (Postmortem Report-Attachment #2)

The following statutes were referred to in analyzing the facts and making of the recommendations:

i. The Constitution of the Republic of Malawi;
ii. The Human Rights Commission Act
iii. The Police Act
iv. The International Covenant on Civil and Political Rights
v. The African Charter on Human and Peoples Rights and
vi. The Penal Code

3.0 PRESENTATION OF FACTS AND EVIDENCE

3.1 Based on the investigations conducted, the Commission has come up with the following facts and evidence:

3.2. The mental health status of the deceased prior to the shooting
3.2.1 According to a testimony by the complainant who was the deceased’s brother, he stated that the deceased was born on 3rd May, 1986 and at the material time was residing at Area 49, Gulliver in Lilongwe.

3.2.2 He said that the deceased studied IT Systems Course after his secondary education. He then worked at Technobrain and Crossroads Hotel. After leaving his job at Crossroads Hotel, he worked as a Fitness Trainer at Sana Fitness Centre. He was later involved in offering fitness lessons to individuals and groups as an individual consultant.

3.2.3 He explained that he noticed a change in the deceased’s behavior in November, 2020. The complainant observed that the deceased started getting angry, raising voices and on one particular day he became so violent at Gulliver Market that his family had to intervene with the help of other people. The family later on took him to Area 18 Asamala Medi-Clinic.

3.2.4 At Asamala Med-Clinic, the late Dr. Kalanda noticed that the deceased had psychiatric problem. Dr. Kalanda referred him to St. Johns of God. St. Johns of God admitted him for 2 months for bipolar disorder according to a medical report from St. Johns of God (Annex 1).
3.2.5 After the deceased was discharged, he stayed for a year without any psychiatric problem but later he stopped taking medication.

3.2.6 According to the complainant, on 7th August, 2022 the deceased was acting hostile and aggressive. He was shouting at his mother and anyone around. He was unsettled, shouting at anyone and was walking in and out of the house aimlessly.

3.2.7 On this material day, the complainant stayed with him from 11 a.m. and tried to persuade him to take him to the hospital but the deceased denied. The deceased finally left home around 8 o’clock in the evening and never came back. Then the complainant also left afterward for his house in New Shire Area 49.

3.2.8 At around 12 mid-night, the complainant’s mother received a phone call from Lilongwe Police Station informing them that the deceased was in custody. The complainant directed her sister to go to St. Johns of God to collect the deceased’s medical report so that they should show the police in the morning that the deceased had a mental health problem.

3.2.9 The complainant, his mother and another relative arrived at the police station around 8 a.m. on 8th August 2022 but the police were reluctant to attend to them up until 12 noon when they were attended by the Station Criminal Investigation Officer Laudon Nthinda.

3.2.10 Nthinda explained to the deceased’s family that there was a fracas at Acres Bar at the Gateway Mall where the deceased took a bottle of water without paying and walked away. One bar-tender ran after him and started fighting. Thereafter, Gateway Mall Police Unit was alerted and a policeman came. The deceased started fighting with the policeman and later went to hide in Acres Bar. The police officer then shot him dead because he wanted to confiscate a gun which the police officer carried.

3.2.11 The police advised them to go to Kamuzu Central Hospital (KCH) mortuary to identify the body and they went without police escort.

3.2.12 At KCH’s mortuary they found the deceased’s body dumped with other dead bodies in a non-functional cooler. The complainant instructed the mortuary attendant to remove the body immediately from where it was to a better functioning cooler.
3.2.13 As a family, they agreed to engage a private pathologist to conduct an autopsy before burial.

3.3 The deceased spotted at Acres Bar at Gateway Mall.
3.3.1 According to Wilson Malunga, a bartender at Acres Bar, the deceased visited the bar for the first time since he joined the bar on 21st July, 2022. He said that he saw the deceased coming into the bar in the evening on 7th August 2022 and then aggressively asked for a bottle of water.

3.3.2 Malunga said that he gave him a bottle of water valued at K800. The deceased drank a bit and later went out after a short time. The deceased then went inside the bar again to collect his bag which he had left inside before he went outside again.

3.3.3 Malunga reported the issue to his fellow bartender Gerald Bandawe who said that he should wait for him a bit maybe he would come back. After sometime, Malunga went to search for him outside the bar. He asked the security guards if they had seen a person he described, the security guards said that they saw him and because he was looking suspicious, they closed the gates to the mall.

3.3.4 Malunga managed to meet the deceased and when he asked him about the payment, the deceased responded that: “Iwe ndi amene walimba mtima kuzandifunsa?” meaning to say that: “So are you the brave one to come and ask me for payment?” Before Malunga responded, the deceased immediately punched Malunga with a feast on his head and he fell down. The deceased squeezed him on the floor such that he sustained bruises on his elbow.

3.3.5 The security guards upon seeing this, rushed to inform the Gateway Mall Police Unit. Malunga then managed to escape from the deceased and ran into the bar.

3.3.6 Malunga further said that some minutes later he saw the deceased coming into the bar and hiding behind the bar counter. Police officer also came and followed the deceased to where he had been hiding behind the counter. Gerald Bandawe ran from the door where the deceased was hiding because he wanted to protect him from damaging the property.

3.3.7 Malunga said that he heard the police officer saying that he wanted to shoot the deceased and the deceased raised his hands up in the air whilst telling the police officer that he was a Malawian. But the police officer shouted back that the deceased might be a Nigerian thug because he was speaking in English.
3.3.8 The deceased then grabbed Gerald Bandawe and used him as a human shield from being shot at. The moment that Gerald managed to move away from the deceased, the police officer shot him point blank range from a distance of not more than 2 meters.

3.3.9 Malunga said another police officer came and tried to control his friend after the shooting incident but the police officer who shot the deceased sounded drunk and refused to surrender the gun. Malunga also recalled that the police officer that had shot the deceased had been seen taking beer at the bar hours before the incident. Malunga confidently said that at the time the officer looked drunk.

3.3.10 According to Malunga, the deceased died immediately after the shooting and that police officers from Lilongwe Police Station came to pick up the dead body.

3.3.11 He said that the deceased behaved abnormally but was not drunk at the time when he asked for a bottle of water.

3.3.12 Malunga informed the Commission that the CCTV cameras which were in the bar were not functioning and at the time of the interview, the Commission found technicians repairing the CCTV cameras. The only cameras which were functional were the ones which were outside the bar run by Proteligent Security under MPICO.

3.4 Evidence from Mr. Gerald Bandawe (the bar tender)
3.4.1 According to Gerald Bandawe, he joined Acres Bar on 15th March, 2019. On this material day, it was around 10 p.m. when the deceased came and asked for a bottle of water in a forceful manner and some people thought that he was a foreigner due to his appearance and the way he was speaking.

3.4.2 He informed the Commission that after taking a bottle of water, he kept his bag in the bar and went to the toilet. After some few minutes, he came to take his bag and went outside without paying the bill. He said his fellow bartender, Malunga, informed him that the deceased did not pay the bill. About 15 minutes later, Malunga followed the deceased outside where he met the deceased and asked him for the bill payment. This did not please the deceased who later assaulted the bar tender. Then one of the security guards went to call upon the police.

3.4.3 Bandawe further stated that when he went out of the bar, he saw the deceased near Acres Bar
and met the police officer outside the bar. The police officer who came was also at Acres Bar drinking where he bought two bottles of beer before the deceased arrived. He was in civilian attire.

3.4.4 The deceased and the police officer had a discussion of about five minutes and the deceased acted friendly but all of a sudden, the deceased jumped on to the police officer and the police fell down. According to him, the deceased wanted to grab the rife from the officer. However, with the help of the security guards, he was not successful.

3.4.5 The deceased went into the Acres Bar, to the counter Area. The Police officer followed him and told the deceased that he was going to shoot him since he suspected that he was a thug and a Nigerian. When the deceased saw that he was overpowered, he started shouting that he was a Malawian and begged the Police officer not to shoot him. He knelt down and raised his hands up.

3.4.6 According to Bandawe, the pleas from the deceased did not impress the police officer, who insisted that he would shoot the deceased because he (the police officer) was physically assaulted and that the deceased was a thug.

3.4.7 According to Bandawe, the police officer followed the deceased to the counter where he looked calmer compared to the way he was outside the bar.

3.4.8 At this point the deceased grabbed Bandawe and used him as a shield. Bandawe however managed to slip away from the deceased and the police officer shot the deceased on the chest at a distance of not more than two metres.

3.5 Evidence from Police
3.5.1 According to Lilongwe Police Station Officer Mwamukiri, the deceased bought a bottle of water at Acres Bar and did not pay. He later on assaulted the barman that had approached him to enquire about the payment. She further explained that one security guard went to call the police who ventured into negotiations with the deceased. However, later the deceased started quarreling with the police officer where he wanted to grab the rife from the Police officer. He slapped the Police officer and the Police officer fell down. Guards came to help the Police Officer and managed to overpower the deceased.

3.5.2 She further added that the name of the police was Sub-Inspector David Chitsike and was arrested by the police over the incident. The police officer sustained bruises and he was treated as
an outpatient.

3.5.3 However, she had no information on how the shooting came in hence she referred the Commission to the head of Criminal Investigations, Nthinda, who further directed the Commission to the Regional Police Headquarters. The Station Officer told the Commission that the officer was in custody yet to be charged with case of murder.

3.5.4 According to the Regional Criminal Investigation Officer, Oscar Nkhoma, Sub-Inspector David Chitsike was stationed at Gateway Police Unit and on this day, he was on duty.

3.5.5 According to him the deceased went into the bar and asked for a bottle of water. The bartender came to ask for the payment. The deceased slapped the bartender. Some people reported the matter to Gateway Police Unit.

3.5.6 The police officer visited the scene and discussed with the deceased. The deceased later jumped on to the officer and wanted to grab the rifle from the officer. The police officer was roughed up and this provoked the officer who shot him dead. He further added that the police officer had been arrested and charged with murder case because the force that the police officer used was excessive and it was not out of self-defense.

3.5.7 Mr. Nkhoma further said that police officers were not trained to handle persons with mental health problems. The police training curriculum does not include that aspect.

3.5.8 Mr. Nkhoma said when responding to such incidences, police officers were supposed to be in a company of not less two officers at a time.

3.6 Evidence from the CCTV Camera
This evidence is based on the CCTV footage which the Commission viewed at MPICO’s security agency known as Proteligent on 16th August 2022 in the company of police officers from Central West Police Division. The footage captured the incident as follows:

3.6.1 The deceased arrived at Acres bar and went inside the bar with a bag. Some minutes later he came out of the bar without his bag but with a bottle of water and sat on the pillars outside the bar. He went back inside the bar and took his bag out of the bar.

3.6.2 The deceased was seen going closer to the main gate which was closed. Further to that, a
bar-tender was seen asking the security guards of the whereabouts of the deceased. The guards pointed to the direction they saw him going. The bartender, Malunga, ran after the deceased. Upon meeting him, the deceased was seen beating the bartender and for some minutes the bartender was down on the ground.

3.6.3 The Commission also noted that the security guards who came to control the situation started running away together with their dog thereby leaving Malunga alone in the hands of the deceased. Thereafter, Malunga managed to escape from the hands of the victim and was seen running away into the bar.

3.6.4 Some minutes later the deceased was seen going towards the bar and stood on the steps where he had been seen before and he changed clothes.

3.6.5 The police officer who had carried a rifle was seen meeting the deceased and calming him down, he touched him on his shoulders. They talked for some minutes.

3.6.6 Then all of sudden the deceased punched the police officer with a blow and the police officer fell down. Then a fracas ensued whereby the police officer and the deceased were all seen battling for the rifle. The security guards intervened and overpowered the deceased who was later on seen going inside the bar.

3.6.7 Some people gathered at the incident scene and were seen discussing with the police officer. The police officer was seen making a phone call. After the call, he went inside the bar.

3.6.8 Minutes later, people were seen running away from the bar and another police officer who came to intervene in the situation was seen talking with the police officer who was at first battling with the deceased.

3.6.9 The Commission asked the Proteligen CCTV Operator who was in the room as to why the gates for Gateway Mall were closed at the time of the incident, the operator responded that they always close the gates at night and it was not only on this day.

3.7 Medical Evidence and Records

The Commission also gathered evidence from Saint John of God Hospital Services and a postmortem report from Malmed Healthcare Services.
3.7.1 According to St. John of God Hospitaller Services medical report (Annex #2), it was showing that the deceased was admitted to their unit from 5th December, 2020 to 8th January, 2021.

3.7.2 He was diagnosed with Cannabis Induced Bipolar Disorder, Manic Episode and Cannabis use disorder.

3.7.3 The report also indicated that there was a positive family history of mental illness. During the early days of admission at the clinic he exhibited the following: talkativeness, overfamiliarity, elated mood, psychomotor agitation and flight of ideas.

3.7.4 According to Malmed Healthcare Postmortem report (annex #1), the deceased died of unnatural death from gunshot wounds.

3.7.5 The report further stated that the deceased was shot from an oblique angle with barrel of the gun pointing downwards at him; not a common accidental scuffle related shooting situation.

4.0. APPLICABLE LAW

4.1 This section discusses the national legal and institutional framework applicable to the issues raised in the present matter. The section also discusses the applicable foreign case law and the regional and international human rights instruments which Malawi is a party to.

4.1.1 Protection of human rights and freedoms

The Constitution of the Republic of Malawi (the Constitution) guarantees the protection of rights and freedoms. Section 15(1) of the Constitution states:

“the human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature, judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter”

4.1.2 The right to life

The Constitution guarantees the right to life. Section 16 of the Constitution provides:

“Every person has the right to life and no person shall be arbitrarily deprived of his or her life: Provided that the execution of the death sentence imposed by a competent court on a
person in respect of a criminal offence under the laws of Malawi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her right to life.”

Various regional and international human rights instruments also enshrine the right to life and prohibit arbitrary deprivation of life. These instruments include: The Universal Declaration on Human Rights (UDHR)\(^1\); the International Covenant on Civil and Political Rights (ICCPR)\(^2\); and the African Charter on Human and Peoples Rights (ACHPR)\(^3\).

4.1.3 **Human dignity and personal freedoms**

Section 19 of the Constitution provides that:

1) *The dignity of all persons shall be inviolable*

2) *In any judicial proceedings or in any other proceedings before any organ of the state, and during the enforcement of a penalty, respect for human dignity shall be guaranteed*

3) *No person shall be subject to torture of any kind or cruel, inhuman or degrading treatment or punishment*

4) *No person shall be subject to corporal punishment in connexion with any judicial proceedings or any other proceedings before any organ of the State*

5) *No person shall be subject to medical or scientific experimentation without his or her consent*

6) *Subject to this Constitution, every person shall have the right to freedom and security of person, which shall include the right not to be –*
   a) *detained without trial;*
   b) *detained solely by reason of his or her political or other opinions or*
   c) *imprisoned for inability to fulfil contractual obligations*

4.1.4. **Powers to use firearms**

Section 44(1) of the Police Act provides that:

“44-(1) Any police officer may use any firearms against –

(a) Any person in lawful custody charged with or convicted of a felony when such person is escaping or attempting to escape;

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\(^1\) See Article 3
\(^2\) See Article 6
\(^3\) See Article 4
(b) Any person who by force rescues or attempts to rescue any other person from lawful custody;

(c) Any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person;

Provided that:-

(i) Resort shall not be had to any such firearm as authorized under paragraph (a) unless such officer has reasonable ground to believe that he cannot otherwise prevent the escape and unless he shall give warning to such person that he is about to use such firearms against him and such warning is unheeded;

(ii) Resort shall not be had to any such firearms as authorized under paragraph (b) and (c) unless such officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm and that he cannot otherwise effect such arrest or prevent such rescue;

(iii) No police officer shall, in the presence of his superior officer use such arms against any person except under orders of such superior officer;

(iv) The use of firearms under this section shall as far as possible be to disable and not to kill."

4.1.5. Causation of death

According to Section 215 of the Penal Code a person is deemed to have caused the death of another although his act is not the immediate or not the sole cause of death:

(a) If he inflicts bodily injury in consequence of which that other person undergoes surgical or medical treatment which causes death.

(b) If he inflicts a bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living.

(c) If by actual or threatened violence he caused another to perform an act which caused the death of such person.

(d) If by any act or omission, he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death.
(e) If his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

4.2 Basic principles on the use of force and firearms by law enforcement officials adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27th August to 7th September 190

4.2.1 Special provisions
Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

4.2.2 In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

5.0 ANALYSIS OF FACTS AND EVIDENCE

5.1 Whether the right to life was preserved

5.1.1 Facts and evidence gathered by the Commission show that the deceased had a mental health condition known as Cannabis Induced Bipolar disorder, Manic Episode and Cannabis use disorder.

5.1.2 The Commission also established through the medical report that there was a positive family history of mental illness and during the early days of admission at the clinic he exhibited the following: talkativeness, overfamiliarity, elated mood, psychomotor agitation and flight of ideas.
5.1.3 The facts and evidence gathered confirmed that on the day of the incident the victim became violent before going to Acres Bar.

5.1.4 The deceased’s conduct at Acres Bar of physically assaulting the bartender and the police officer while tussling for a gun also threatened the right to life of many people who were at the bar. His conduct was a threat and contributed to the shooting by the police officer.

5.1.5 The post mortem examination conducted by Pathologists Liomba and Dzamala on 11th August, 2022 showed that the deceased died of unnatural death caused by gunshot wounds and not common accidental situation.

5.1.6 In terms of Section 16 of the Constitution, every person including a police officer is entitled to the right to life and the right not to have his life arbitrarily deprived.

5.1.7 Looking at the circumstances that occurred before the victim was shot dead, the tussling for the gun could have led to many deaths and injuries if the deceased managed to get hold of the gun. Shooting to disable him could have been the better option since the victim was too violent. However, it has been established that at the time of the shooting, the deceased had been subdued and was begging the police officer not to shoot him. At that moment, the life of the police officer and bystanders was not in immediate danger. The shooting and the manner of it was therefore unwarranted.

5.1.8 The shooting of the deceased amounts to arbitrary deprivation of his life which is a violation of the right to life guaranteed by Section 16 of the Constitution and various human rights instruments Malawi is a party to including the UDHR⁴; the ICCPR⁵; and the ACHPR⁶

6.0 FINDINGS

6.1.1 Based on the facts and evidence gathered during the investigation, as well as the legal analysis, the Commission has come up with the following findings:

⁴ See Article 3
⁵ See Article 6
⁶ See Article 4
a) THAT the deceased, aged 36, was living with his mother at Area 49, Gulliver in Lilongwe and was a gym trainer by profession.

b) THAT the deceased had a mental health problem. This is based on the evidence from the brother to the deceased and the medical report from St. Johns of God Hospital Services.

c) THAT the medical report stated that there was a positive family history of mental illness. During the early days of admission at the clinic he exhibited the following: talkativeness, overfamiliarity, elated mood, psychomotor agitation and flight of ideas.

d) THAT on the day of his death, the deceased became aggressive and violent. The complainant (deceased’s brother) testified to this and the CCTV footage showed the same as well as the testimonies of the bartenders.

e) THAT the CCTV recorded that around 10 p.m. the deceased was seen at Gateway Mall premises where he visited Acres Bar.

f) THAT upon entering Acres Bar, the deceased ordered a bottle of water but he did not pay for it.

g) THAT when bartender Malunga followed the deceased and asked him about payment for the water bottle, the deceased reacted violently and roughed up the bartender.

h) THAT police officer David Chitsike arrived at Acres Bar whilst carrying a riffle in the company of the guard. No other police officer accompanied him.

i) THAT Chitsike calmed down the deceased for some minutes and tried to reason with him.

j) THAT the deceased beat up the Chitsike who fell down together with his riffle and the deceased struggled with him to confiscate the riffle.

k) That the deceased provoked bar tenders at acres bar and officer Chitsike.

l) THAT the deceased was overpowered by the security guards who joined the fracas to help Chitsike

m) THAT the deceased hid under the counter of the bar where the bar attendant Bandawe went in to protect the bar materials and money.

n) THAT Chitsike threatened to shoot the deceased and the deceased surrendered his arms in the air begging Chitsike not to shoot him

o) THAT the deceased used Bandawe as a shield for him not to be shot by Chitseka

p) THAT despite the pleas from the deceased, Chitsike shot at and killed the deceased from a distance of about two metres.
q) THAT Chitsike was arrested, charged with murder and is remanded at Maula Prison pending trial.

r) THAT according to the postmortem examination which was conducted on 11\textsuperscript{th} August, 2022 at KCH by Malmed Healthcare Services, (Attachment # 2) the deceased died of unnatural death from gunshot wounds and the bullet was retrieved from his body.

s) THAT the postmortem report further stated that the deceased was shot from an oblique angle with barrel of the gun pointing downwards at him; not a common accidental scuffle related to a shooting situation.

7.0 CONCLUSION

7.1 In conclusion the Commission states that this needless death could have been avoided had all possible measures been taken. Although the police officer had been roughed up earlier on and almost lost possession of his rifle, the situation at the time of the shooting did not warrant use of such lethal force as to cause loss of life. He is therefore to be held liable for causing the death of the deceased.

8.0 RECOMMENDATIONS

Pursuant to the powers conferred on it by Section 130 of the Constitution and Section 22 of the Human Rights Commission Act, the Commission makes the following recommendations:

8.1 Malawi Police Service

8.1.1 The Malawi Police Service must expeditiously conclude criminal investigations into the death of the deceased.

8.1.2 Depending on the outcome of the criminal investigations of Police Officer Chitsike, the Director of Public Prosecutions should ensure timely prosecution of the case to ensure that justice is served for both the family of the victim and the perpetrator.

8.1.3 The Malawi Police Service should consider including in the police training curriculum on handling of persons with mental health problems and initiate in-service training on the same for police officers.

8.1.4 Malawi police Service must investigate the conduct of officer Chitsike regarding the allegation that he reported for duties while under the influence of alcohol.
8.2 Ministry of Health

8.2.1 Ministry of Health should increase public awareness on mental health issues and establish helpline for the public to access where a person is with mental health issues need immediate assistance.

8.3 Deceased’s Family

8.3.1 The family of the deceased have a right in a civil claim to seek for compensation for loss of life which was arbitrarily taken by Officer Chitsike.

ANNEX
Attachment #1: Medical Report from St. Johns of God Hospital
Attachment #2: Postmortem Report from Malmed Healthcare Services

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CHAIRPESON
16th DECEMBER 2022