



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1210 OF 2023

MERCY MWANGI.....COMPLAINANT

-VERSUS-

ZAIDI PATO LIMITED.....RESPONDENT

DETERMINATION

(Pursuant to Section 8(f) and 56 of the Data Protection Act, 2019 and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021)

A. INTRODUCTION

1. The Constitution of Kenya 2010, under Article 31 (c) and (d) provides for the right to privacy. Consequently, as an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter known as 'the Act') was enacted.
2. The Office of the Data Protection Commissioner (hereinafter 'this Office' and/or 'the Office') was established pursuant to Section 5 of the Act and is mandated with the responsibility of regulating the processing of personal data; ensuring that the processing of personal data of a data subject is guided by the principles set out in Section 25 of the Act; protecting the privacy of individuals; establishing the legal and institutional mechanism to protect personal data and providing data subjects with rights and remedies to protect their personal data from processing that is not in accordance with the Act.
3. Section 8 (f) of the Act provides that the Office can receive and investigate any complaint by any person on infringements of the rights under the Act. Furthermore, Section 56 (1) of the Act provides that a data subject who is

aggrieved by a decision of any person under the Act may lodge a complaint with the Data Commissioner in accordance with the Act.

4. It is on that basis that the Office received a complaint dated 11th July 2023 pursuant to Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (the Regulations) from the Complainant, who was an aggrieved data subject.
5. The Respondent is a digital credit provider that runs a product named Mokash and the Complainant is a party who allegedly received unsolicited messages from the Respondent's product.
6. This determination is pegged on the provisions of Regulation 14 of the Regulations which states that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

B. NATURE OF THE COMPLAINTS

7. The Complainant alleged that Mokash, a product of the Respondent, was sending her unsolicited messages purporting that she guaranteed someone who took a loan with them. She attached screenshots of some messages which she received from Mokash.
8. She stated that she had never guaranteed anyone to take a loan and in the event that she does, the lender should seek authority and confirm from her.
9. The Complainant requested this Office to take action against the Respondent for these actions.

C. THE RESPONDENT'S RESPONSE

10. The Respondent responded to the Notification of Letter *via* an email dated 1st September 2023.
11. The Respondent stated that it has put great emphasis on ensuring compliance with legal and regulatory frameworks within which its operations fall. Specifically, it stated that it had endeavoured to be compliant with the Act and the Regulations and has adopted various policies and mechanisms such as the Data Protection Policy. They provided the said policy as proof of the same.
12. Subsequent to becoming aware of the complaint, the Respondent stated that it started internal investigations to establish the veracity of the said complaint,

find out the culpable party, and hold them personally responsible and further to fortify their systems and mechanisms for deterrence purposes.

13. The Respondent averred that they contracted an outside company to remind its customers of their loan repayment whenever the said payments fell due. The outsourced company executed its reminding function by sending the customers reminder messages on their registered mobile phone numbers, which they provide them with at the point of on-boarding.
14. The Respondent stated that as per their agreement with the outsourced company, the reminder messages are only meant to be sent to customers who have defaulted on their loan repayment, and their listed referees in the event that the customer cannot be reached and they continue to default.
15. The Respondent averred having not been directly involved in this activity since procuring the services of the outsourced company. However, they are apologetic of the occurrence and undertook to take all necessary measures to rectify the same.
16. The Respondent attached its terms and conditions which outline the terms of engagement between themselves and all their clients. The terms and conditions further expressly state that the listing of a referee is a prerequisite to being on-boarded to their services.
17. Further, the Respondent stated that they only have standard and binding contracts with persons who are on-boarded to their services after accepting their terms and conditions.
18. On the legal basis they relied upon to contact their clients' referees, the Respondent averred that it was necessary for the performance of their respective contractual obligations in the digital credit provision transactions. They stated that they only reach out to listed referees when the customer who listed them fails to honour the contractual obligation by failing to make the loan repayment.
19. As part of their terms and conditions, the Respondent averred that the listing of referees is one of the core prerequisites for the onboarding of customers to their platform and it is only upon accepting the said terms that customers can be successfully onboarded if they meet the other requirements.
20. Therefore, according to the Respondent, they only rely on the basis of necessity to contact persons listed as referees and even then, only for purposes of sending them reminder messages.

21. The Respondent averred that it recently conducted a gap assessment of their product and its operations and noted inadequacies in their referees onboarding process as far as the safeguarding of their data subjects' rights is concerned and specifically, their right to be notified.
22. The Respondent stated that they are in the process of revamping their system in a bid to include a feature which shall allow persons being listed as referees to either accept or deny the request to be listed as such. This shall ensure they comply with the duty to notify under Section 29 of the Act.
23. The Respondent also indicated that they are in the process of reviewing their standard contract with the outsourced company to make clearer the responsibilities of the respective parties to the contract. Additionally, they stated that they plan to re-train all the members of staff on observing the rights of data subjects and consequences of infringement of these rights.

D. ISSUES FOR DETERMINATION

- i. Whether the Respondent fulfilled its obligations under the Act;
- ii. Whether the Respondent fulfilled its duty to notify the Complainant of the use of their contact details as per the Act; and
- iii. Whether there was any infringement of the Complainants' Rights as data subjects as provided for in the Act.

I. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT.

24. Section 25 of the Act provides, among others, the principles of data protection whereby data controllers and data processors are obligated to ensure that personal data is-
- a) Processed in accordance with the right to privacy of the data subject;
 - b) Processed lawfully, fairly and in a transparent manner in relation to any data subject; and
 - c) Collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes.
25. Further, Regulation 21 of the Data Protection (General) Regulations, 2021 ("the General Regulations) provides for the sharing of personal data and permits data controllers and data processors to share or exchange personal data collected, upon request, by another data controller, processor or third party or a data

subject. This data sharing includes, among others, receiving personal data from a data controller or processor as joint participant in a data sharing agreement.

26. The Respondent intimated to having contacted an outsourced company to remind its customers of their loan repayments and their referees in case the customer cannot be reached. However, the Respondent failed to provide the legal basis upon which they contracted this outside company to process the data of their customers and the referees. They did not provide a data sharing agreement which outlines the duties and responsibilities of the outside company.

27. I therefore find that the Respondent did not fulfil its obligations under Section 25 of the Act.

II. WHETHER THE RESPONDENT FULFILLED ITS DUTY TO NOTIFY THE COMPLAINANT OF THE USE OF THEIR CONTACT DETAILS AS PER THE ACT.

28. Section 28 of the Act states that a data controller or processor shall collect personal data directly from the data subject and shall collect, store or use personal data for a purpose which is lawful, specific and explicitly defined.

The Respondent collected the Complainant's phone number details from their customer and not directly from her thereby being in violation of the above provision.

29. Further, Section 29 of the Act places a responsibility on data controllers and data processors to, among others, inform the data subject of their rights, the fact that their personal data is being collected, the purpose for collection, ***the third parties to whom their personal data will be transferred to***, including details of safeguards adopted and ***whether any other entity may receive the collected personal data***.

30. In this case, the Respondent is a data controller and the outsourced company is a data processor as per the definitions set out in the Act.

31. The Respondent in its response admitted to having an outsourced company to remind its customers of their loan repayments and that the outsourced company sends reminder messages to customers who default on their loan repayments as well as their referees in the event the customers cannot be reached and they continue to default.

32. The Respondent stated that it is now that they are putting in place reforms to ensure that referees are informed prior to being listed as such. This reform is noted. However, for the purpose of this complaint, the Respondent has failed to prove that the Complainant was duly informed of their number being listed as referee.

33. In this regard, I find that the Respondent did not have a lawful basis to process the Complainant's personal data, they did not notify them before enlisting them as emergency contacts and did not have a mechanism whereby the proposed referees can have the liberty to decide whether or not they will guarantee a loanee, how much they are going to guarantee and whom they are guaranteeing. The Complainants did not have an option to decline to guarantee a loanee and were only informed about the loan when the loanee had defaulted or failed to pay in time.

34. I therefore find the Respondents liable for breach of Sections 28 and 29 of the Act.

III. WHETHER THERE WAS ANY INFRINGEMENT OF THE COMPLAINANT'S RIGHTS AS A DATA SUBJECT AS PROVIDED FOR IN THE ACT

35. Section 26 of the Act provides for the rights of a data subject which are: -

- a) to be informed of the use to which their personal data is to be put;
- b) to access their personal data in custody of data controller or data processor;
- c) to object to the processing of all or part of their personal data
- d) to correction of false or misleading data; and
- e) to deletion of false or misleading data about them.

36. By not informing the Complainant of the use to which her personal data was to be put at the point of collection of the personal data, the Respondent violated the Complainant's right to be informed. The Respondent collected the contacts of the Complainant from its customer and did not inform the Complainant that her personal data was being collected and what it was going to be used for. It did not inform the Complainant that it has collected her mobile phone number and that it was going to process that information for the purpose of debt recovery from the defaulting borrower.

37. Further, as a data controller, the Respondent should only collect personal data *directly* from the data subject as per Section 28 of the Act unless the data

subject has **consented** to the collection of their data from another source. Further, they should have informed the Complainant, before collecting her phone numbers, (regardless of the mode of collection), the fact that they have her phone numbers and that she will be contacted in the event the borrower defaulted in repaying his loan.

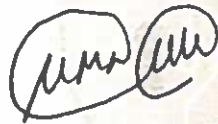
38. In view of the foregoing, I find that the Respondent violated the rights of the Complainant as provided for in the Act by failing to inform her of the collection and use of her personal data and that the Respondent did not collect personal data directly from the Complainant.

E. FINAL DETERMINATION

39. The Data Commissioner therefore makes the following final determination;

- i. The Respondent is hereby found liable.
- ii. An Enforcement Notice to issue to the Respondent.
- iii. Parties have the right to appeal this determination to the High Court of Kenya.

DATED at **NAIROBI** this 6th day of October 2023.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

