



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1346 OF 2023

EUNICE MUENI.....COMPLAINANT

-VERSUS-

AVENTUS TECHNOLOGY LIMITED.....RESPONDENT

DETERMINATION

(Pursuant to Section 8(f), 8(k), 9(g) and 56 of the Data Protection Act, 2019 and Regulations 13 (3) and 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021)

A. INTRODUCTION

1. The Office received a complaint on the 23rd July 2023, in accordance with Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (the Regulations). The Complaint relates to the alleged unlawful processing of the Complainant's NHIF data by the Respondent which data was used to send unwanted messages from the Respondent's product, Lendplus.

B. LEGAL BACKGROUND

2. 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.
3. 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.

4. 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. Further, Section 8(k) of the Act states that the Office shall perform such other functions as may be prescribed by any other law or as necessary for the promotion of the Act. The Data Commissioner also has powers under Section 9 (g) to undertake any activity necessary for the fulfillment of any of the functions of the Office.
5. 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.
6. This determination is pegged on the provisions of Regulations 13 (3) of the Regulations which states that in conducting investigations, the Data Commissioner shall be guided by the provisions of the Fair Administrative Action Act, 2015. Therefore, in exercise of the Data Commissioner's powers, this Office has reviewed the determination dated 25th October 2023 in light of new evidence from the Respondent that has come to the Office's attention.
7. Therefore, the Data Commissioner makes this determination pursuant to Regulation 14 (1) of the Regulations which states that upon the conclusion of the investigations, the Data Commissioner shall make a determination based on the findings of the investigations.

C. NATURE OF THE COMPLAINT

8. The Complainant alleged that Lendplus, a product of the Respondent, unlawfully accessed her NHIF records in a bid to ensure that she pays her loan.
9. She provided a screenshot showing Whatsapp messages from the number +254732XXX015 from a person who introduced herself as Maureen from Lendplus. The message indicated that the Respondent could see where the Complainant works and that she is deducted a certain amount for NHIF remittance meaning she earns a good salary.
10. The Complainant alleged that this was a violation of her privacy.

D. SUMMARY OF EVIDENCE ADDUCED

11. This Office received the complaint dated 23rd July pursuant to the provisions of the Act and the Regulations.

12. Upon admission of the complaint, the Respondent was notified of the complaint through a letter dated 12th September 2023 and was given fourteen (14) days to respond to the complaint pursuant to Regulation 11 of the Regulations. The Respondent received the said letter on 13th September 2023.
13. The Respondent was further sent a reminder letter dated 28th September 2023, received by themselves on 29th September 2023 given them a further seven (7) days to respond to the complaint.
14. The Respondent responded to the notification of complaint vide an email dated 7th October 2023 and stated that they indeed received the Complainant's email and a follow up call was made to the Complainant. She was however not reachable.
15. The Respondent further stated that they had a standard contract with the Complainant which was availed prior to processing of the loan. The contract contained terms and conditions and a privacy policy which the Complainant was to read and understand before applying for the loan.
16. Further, the Respondent submitted that the Complainant was notified of the processing of her personal data according to their terms of agreement. It averred that a customer is always requested to read and understand the terms of agreement before onboarding with them. The Respondent attached the said terms and conditions.
17. The Respondent also attached their privacy policy which it stated that it elaborates how data is processed and the measures taken to ensure that customers understand the process and the data required from them.
18. With regards to access to the Complainant's NHIF data, which is the bone of contention of this complaint, the Respondent stated that they do not have access to NHIF. However, they get a breakdown of the customer's salary's deduction through a public pay calculator portal provided by the Kenya Revenue Authority.

The Respondent stated that the portal enables them to acquire information such as PAYE, Housing Levy, NSFF and NHIF deductions from the given salary range by the Customer. According to their response, the Complainant provided data to them which included, but not limited to, monthly income, employment details and a contact person. They also calculate the total deductions of a customer using the PAYE calculator in order to ascertain the customer's ability to repay back the loan amount.

19. The Respondent attached a screenshot of the calculator used from the site - calculator.co.ke/kra-payee-calculator in which they inputted the basic salary as Kshs. 100,000 as provided by the Complainant. The calculations then indicated the NHIF contribution deduction of Kshs. 1700. This is the information the Respondent claimed to have used to inform the Complainant of her ability to repay the loan.

E. ISSUES FOR DETERMINATION

20. It is not in dispute that the Complainant took a loan with the Respondent and had delayed in clearing her loan.

21. The following issues fall for determination by this Office:

- i. Whether there was a violation of Complainant's rights under the Act;
- ii. Whether the Respondent fulfilled its obligations under the Act; and
- iii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THERE WAS A VIOLATION OF COMPLAINANT'S RIGHTS UNDER THE ACT

22. The Complainant is a data subject with rights under Section 26 the Act. Moreover, the Complainant has the right to be informed of the intended use of her personal data under Section 26(a) of the Act.

23. Further, Section 29 of the Act provides an obligation to data controllers or data processors of the duty to notify the data subject. Notably, the data subject has to be informed of, *inter alia*;

- i. rights specified under Section 26;
- ii. the fact that personal data was being collected;
- iii. the purpose of collection of personal data; and

24. The Respondent provided their terms and conditions including their privacy policy both of which were made known to the Complainant before she took the loan. This information included the Complainant's right to be informed of the manner in which her personal data was to be used and the purpose of collection of her data.

25. Therefore, the Complainant's rights under the Act were upheld by the Respondent. The Respondent was able to demonstrate the manner in which they knew of the Complainant's NHIF deduction to the satisfaction of this Office.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

26. The Respondent is a data controller and a data processor within the definitions of the Act and therefore has obligations pursuant to the Act.
27. The Respondent has an obligation under Section 25 of the Act to adhere to the principles of data protection while processing the Complainant's personal data. From their response, the Respondent demonstrated that the Complainant's personal data was processed in accordance with the principles laid down under Section 25 of the Act.
28. In collecting personal data, the Respondent is mandated by Section 28 of the Act to collect the data directly from the data subject. The Respondent provided proof that the Complainant provided her personal data willingly and voluntarily in a bid to secure a loan from them.
29. With regards to the NHIF data, the Respondent was able to ascertain the Complainant's deductions through the KRA calculator. They used information provided by the Complainant with regards to her basic salary and therefore, they did not unlawfully obtain this information from elsewhere. It was a simple and basic search on the calculator portal.
30. In the notification of complaint, the Respondent was required to provide the lawful basis upon which they processed the Complainant's personal data under Section 30 of the Act. Section 30 of the Act states that a data controller or data processor shall not process personal data unless the data subject consents to the processing for one or more specified purposes. Further, Section 32 of the Act places the burden of proof on the Respondent for establishing a data subject's consent to the processing of their personal data.
31. The Respondent was able to demonstrate the legal basis they relied upon to process the Complainant's data as she was aware of the terms and conditions prior to borrowing the loan therefore the Respondent fulfilled its obligations as set out under the Act.

III. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS.

32. Having found that the Complainant's rights were upheld by the Respondent and that the Respondent fulfilled its obligations under the Act, the Complainant is not entitled to any remedies under the Act and the attendant Regulations.

33. This complaint as against the Respondent hereby stands dismissed for lack of merit.

F. FINAL DETERMINATION

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

- i. The Respondent is hereby found not liable.
- ii. The complaint stands closed.
- iii. This determination overrides any other determination rendered before.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 17th day of November, 2023.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER