



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 2623 OF 2023

CHRISTINA BULIBA.....COMPLAINANT

-VERSUS-

DHAHABU KENYA.....RESPONDENT

DETERMINATION

(Pursuant to Section 8 (1) (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 Complainant filed a complaint on 18th December 2023 alleging that the Respondent used her image for commercial purposes on its social media pages without obtaining her consent.

B. LEGAL BASIS

2. Article 31 (c) and (d) of the Constitution of Kenya 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 as '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 (1) (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.
5. This determination is premised on the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter as 'the Enforcement Regulations') which states that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

C. BACKGROUND OF THE COMPLAINT

6. This Office received a complaint from the Complainant on 18th December, 2023. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by the Complainant, who was an aggrieved data subject.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 8th January 2024 and referenced ODPC/CONF/1/5 VOL 1(708). In the notification of the complaint, the Respondent was informed that if the allegations by the Complainant were true, they were in violation of various Sections of the Act. Further, the Respondent was asked to provide this Office with the following:
 - a. A response to the allegations made against it by the Complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. The legal basis relied upon to store, process and engage with the Complainant's personal data and whether or how it fulfilled the duty to notify data subjects pursuant to Section 29 of the Act;

- d. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint does not take place again; and
 - e. Details of how it fulfills the data subject's right of erasure as provided for in Section 40(1)(b) of the Act.
8. The Respondents responded to the Notification of Complaint letter *vide* a letter dated 19th January, 2024.
9. This determination is therefore as a result of analysis of the complaint as received, the response by the Respondent and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

10. The Complainant alleged that the Respondent used her images to market its business on its social media pages without her consent.
11. The Complainant provided links of the videos and images allegedly posted on the Respondent's Instagram and TikTok pages and screenshots of her WhatsApp conversations with the Respondent, where she had informed the Respondent that she did not consent to the videos being shared on its social media pages.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

12. The Complainant alleged that on 19th September 2023, she contracted the Respondent to tailor for her a dress that was to be worn on her traditional introduction ceremony. She went to fit the dress on 28th September 2023 and upon fitting it, the Respondent requested to take a video of her in the dress and promised to share the video with her. The video was never shared with her.
13. The Complainant alleged that the Respondent posted a video of her during her dress-fitting session to its Instagram audience of over 30,000 followers and that as of 5th October 2023, the video had been played over 7,000 times. Similarly,

the Respondent shared the same video on its TikTok page to an audience of over 20,000 followers with her name '...', short of '...', captioned on the video. The Complainant provided the links to the alleged videos posted on the Respondent's social media pages as proof of the allegations made.

14. The Complainant stated that on 1st October 2023, she received messages from her colleagues and people who follow her on social media through her WhatsApp, Tiktok and Instagram accounts saying that a video of her in her traditional wedding dress was circulating in social media. Further, people sought to know when she was having the ceremony and whether they would be invited, while others congratulated her. Some people also shared the video. She provided a screenshot of a WhatsApp conversation as proof of the same.
15. She further stated that she had not shared the news of her traditional introduction ceremony which happened on 30th September 2023 with anyone else save for her family and close friends.
16. The Complainant stated that on 4th October 2023, she sent a message to the Respondent airing out her grievance but the same was not responded to. She provided a screenshot of the WhatsApp message which read as follows, *"Hi ... Thank you so much for the dress. It was beautiful. I however did not consent to the videos being shared to the public through reels. I had not shared any details of the ceremony with any other people except my family and close friends. I have now been receiving messages from colleagues and people who follow me on social media regarding a wedding ceremony that I had not shared and it is uncomfortable and also a privacy infringement."*
17. The Complainant stated that as at the time of filing this complaint, the said videos were still up and circulating on the Respondent's social media pages. Additionally, she feels that the Respondent used her image to market its business without her consent and continues to unlawfully benefit from the same.
18. Finally, the Complainant stated that she wanted the Respondent to pull down her images from its social media pages and to be awarded damages of Kenya

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Shillings four million (Kshs. 4,000,000/=) for the infringement on her right to privacy and the unauthorized commercial use of her images.

ii. THE RESPONDENT'S RESPONSE

19. The Respondent in its response acknowledged that a video of the Complainant was recorded at its premises during the outfit fitting for the item it was making for her.
20. The Respondent stated that consent was obtained to film the video, and the nature of the video was such that it could not be recorded without the knowledge or participation of the Complainant. Further, when consent was given, it was the Respondent's belief that the Complainant understood that the video would be shared on its social media platforms as part of its ongoing practice of appreciating its clients who bring it business.
21. The Respondent stated that when it shared the video on its Instagram and TikTok channels, it took great care not to identify the Complainant directly. It used the pseudonym " " and did not directly tag any social media account owned by the Complainant. It also did not identify the purpose the outfit was being made, only that there was an outfit ordered and delivered to the joy of its client. The Respondent provided a screenshot of the shared post as proof.
22. The Respondent stated that on 4th October 2023 at 1734hrs it received a complaint from the Complainant via WhatsApp, where the Complainant stated that she did not consent to have the video shared on social media. At 1902hrs, the Respondent responded to the message and offered to remove the posts but the Complainant never responded to that message. The Respondent provided a screenshot of the said WhatsApp messages as proof.
23. Additionally, the Respondent rendered an apology to the Complainant via a letter dated 17th January 2024 and indicated that it had deleted the posts in question from all its social media platforms. The Respondent provided a copy of the apology letter and screenshots of its WhatsApp conversations with the Complainant, where the Complainant acknowledged receipt and appreciated the apology.

F. INVESTIGATIONS UNDERTAKEN

24. The Office visited the Respondent's Instagram and TikTok pages by clicking on the link provided by the Complainant.

25. As at the time of lodging this complaint, investigations conducted by this Office revealed that the Complainant's images were still available and accessible at the Respondent's Instagram and TikTok pages.

26. Investigations conducted after the notification of complaint letter was sent to the Respondent revealed that the Respondent had deleted the images of the Complainant from its social media pages and they were no longer available for viewing.

G. ISSUES FOR DETERMINATION

27. In light of the above, the following issues fall for determination by this Office:

- i. Whether there was an infringement of the 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 AN INFRINGEMENT OF THE COMPLAINANT'S RIGHTS UNDER THE ACT

28. Section 26 (a) of the Act provides for the right of a data subject to be informed of the use to which their personal data is to be put. The Complainant stated that the Respondent requested to take a video of her and promised to share the video with her, which it never did. On the other hand, the Respondent stated that it obtained consent to film the video and it believed that the Complainant understood that the video would be shared on its social media platforms as part of its ongoing practice of appreciating its clients who bring it business.

29. The Respondent did not prove that it informed the Complainant that her video was going to be posted on its social media pages. Instead, the Respondent assumed that the Complainant understood that the video would be shared on its social media platforms.
30. The Respondent by not informing the Complainant that the video was going to be uploaded on its social media platforms, violated the Complainant's right to be informed of the use to which her personal data is to be put.
31. Section 26(c) of the Act provides for the right of a data subject to object to the processing of all or part of their personal data. The Complainant objected to the processing of her personal data by informing the Respondent that she did not consent to the videos being shared to the public through reels. The Respondent ought to have pulled down the videos from its social media pages without undue delay when the Complainant objected to the processing. The Respondent by not pulling down the said video without undue delay when the Complainant stated that she did not consent to the use of her image, violated the Complainant's right to object to the processing of her personal data.
32. The Respondent only pulled down the videos and issued an apology letter after a complaint had been filed with this Office and a notification letter issued.
33. From the foregoing, this Office finds that the Respondent violated the Complainant's right to be informed of the use to which her personal data was to be put and her right to object to the processing of her personal data.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

34. The Respondent is a data controller within the definition of the Act and therefore has obligations pursuant to the Act.
35. 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. Her rights specified under Section 26 of the Act;
 - ii. the fact that personal data was being collected;

- iii. the purpose for which the personal data is being collected;
- iv. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

The Respondent had a duty to notify the Complainant of her rights under the Act, the fact that her video was recorded for purposes of being posted on its social media pages, and the measures it has in place to ensure the integrity and confidentiality of the data. The Respondent, by not notifying the Complainant of the above, failed to fulfil the duty to notify.

36. Section 30 of the Act gives instances where a data controller or processor can lawfully process personal data. Section 30(1)(a) states that a data controller or processor shall not process personal data unless the data subject consents to the processing for one or more specified purposes or the processing is necessary for the reasons given in Section 30(1)(b).

37. The conditions of consent are provided under Section 32 of the Act which provides that a data controller shall bear the burden of proof to establish that the data subject consented to the processing of their personal data for a specified purpose.

38. The Respondent did not prove that it obtained consent from the Complainant to post her image on its social media platforms. For consent to be valid, it must be specific, informed and unequivocal. The Complainant consented to the video being taken for the purpose of sharing it with her. She did not consent to the video being used for other purposes. The Respondent did not seek consent to post the said image but only assumed that the Complainant understood that the video would be shared on its social media platforms.

39. Further, no evidence was tabled by the Respondent to prove that it relied on any lawful basis outlined in Section 30(1)(b) of the Act and therefore the Respondent processed the personal data of the Complainant contrary to Section 30 of the Act.

40. Section 37(1)(a) of the Act states that, "a person shall not use, for commercial purposes, personal data obtained pursuant to the provisions of this Act unless the person has sought and obtained express consent from the data subject."

No evidence was tabled by the Respondent to prove that it obtained express consent from the Complainant to use her personal data for marketing purposes.

41. Additionally, no evidence was tabled to prove that the Respondent is authorized under any written law to use the Complainant's personal data for commercial purposes and that the Complainant was informed of such use when the Respondent collected the data from the Complainant.

42. From the foregoing, this Office finds that the Respondent failed to fulfil its obligations under the Act.

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

43. Pursuant to Regulation 14 (2) of the Enforcement Regulations, a determination shall state the remedy to which the complainant is entitled. Further, the remedies are provided for in Regulation 14 (3) of the Enforcement Regulations.

44. The Complainant sought for the immediate removal of her images from the Respondent's social media pages. The Respondent removed her images from its social media pages upon receipt of the Notification of Complaint letter from the Office.

45. The Complainant also prayed for damages of Kenya Shillings four million (Kshs. 4,000,000/=) broken down as follows: -

- a) Damages for infringement on her constitutionally protected right of privacy – Kshs 1,000,000/=
- b) Damages for infringement on her data protection rights – Kshs. 1,000,000/=
- c) Damages for unlawful disclosure of her image and personal data – Kshs. 1,000,000/=
- d) Damages for unauthorized use of her image for marketing purposes – Kshs. 1,000,000/=

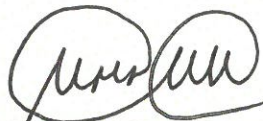
46. Section 65 of the Act provides for compensation to data subjects and states, "*a person who suffers damage by reason of a contravention of a requirement of the Act is entitled to compensation for that damage from the data controller.*"

47. Section 65(4) of the Act states that, "damage includes financial loss and damage not involving financial loss, including distress."
48. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
49. The Office having found that the Complainant's rights were violated and taking into account the delay by the Respondent to pull down the video from the Respondent's social media pages and the nature of business of the Respondent, hereby awards the Complainant Kenya Shillings twenty five thousand (Kshs. 25,000/=) as compensation.
50. Additionally, and relevant to this particular complaint, the Respondent is also guided to strictly adhere to the principles of data protection, particularly lawful use of personal data, and to put in place measures that are in line with data protection by design and by default under the Act to avoid complaints of this nature and administrative fines that are likely to be imposed upon them in the event this Office receives similar complaints.

H. FINAL DETERMINATION

51. The Data Commissioner therefore makes the following final determination;
- i. The Respondent is hereby found liable.
 - ii. The Respondent is hereby ordered to pay the Complainant **Kenya Shillings Twenty Five Thousand (Kshs. 25,000/=)** as compensation.
 - iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 15th day of March, 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER