



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 2648 OF 2023**

**FAITH WAVINYA.....COMPLAINANT**

**-VERSUS-**

**NATION MEDIA GROUP.....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 19<sup>th</sup> December, 2023 alleging that the Respondent caused to be published on its website and other social media sites an Article titled "*Young smokers ditch shisha, cigarettes for cigars. Are they aware of risks?*" after she had allegedly withdrawn her consent to the publication of the said Article.

**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 19<sup>th</sup> 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 30<sup>th</sup> January 2024 and referenced ODPC/CONF/1/5 VOL 1(707). 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 prior to collection of their personal data 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 Office further sent a reminder to the Notification dated 24<sup>th</sup> February 2024. The Respondents responded to the Notification of Complaint letter vide a letter dated 4<sup>th</sup> March, 2024 seeking 14 days to pursue an amicable settlement with a view to settling the matter. The Office in turn extended the time to 15<sup>th</sup> March 2024 in order to meet statutory timeline for resolving disputes.
9. In view of the above, the Office received a response to the Notification dated 15<sup>th</sup> March 2024 from the Respondents.
10. The Office further received a response from the Complainant dated 18<sup>th</sup> March 2024 in response to the Respondent's letter dated 15<sup>th</sup> March 2024.
11. 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**

12. The Complainant alleged that the Respondent caused to be published on its website and other social media sites an Article titled "*Young smokers ditch shisha, cigarettes for cigars. Are they aware of risks?*" Moreover, the Article led with a banner containing the Complainant's likeness which was captioned, "*Cigar enthusiast Faith Wavinya poses for a photo at Brick Cigars Kenya in Nairobi on October, 12, 2023.*" The Complainant alleges that the said Article was used by the Respondent to attract controversy and commercial advantage without her consent.
13. Additionally, the Article further included two other images bearing the likeness of the Complainant. Further, the Complainant alleges that the resultant effect was

that the Complainant's rights under Article 31 of the Constitution being infringed by the publication of her name and likeness in the said Article.

## **E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED**

### **i. THE COMPLAINANT'S CASE**

14. The Complainant indicated that the unavoidable result of the publication of the publication of the name and likeness in the context published is to infringe on and violate the Complainant's right to privacy under Article 31 of the Constitution. The Article further disparages the reputation of the Complainant in the way of her lawful occupation as a marketing professional. The right-thinking members of the public, including the Complainant's employer were left with the false impression that the Complainant is engaged in alternative employment.
15. The evidence adduced includes the infringing Article (which was found on pages 1-8) of the supporting documents submitted to this Office. The Article titled, "*Young smokers ditch shisha, cigarettes for cigars. Are they aware of risks?*" The Article delves into the demographics that use cigars, types of cigars, why they use them, health risks and sample interviews of alleged users including the Complainant.
16. The Complainant goes further to allegedly describe how smoking cigars is a pleasure and not a vice and how it speaks to the how the man or woman appears when smoking the same. The authors description in that regard espouses that the Complainant was smoking a certain type of cigar while giving the interview.
17. A social media extract (found on page 9 of the supporting documents) and an extract of comments on the infringing social media posts (Page 10 of the supporting documents) was also adduced as evidence. The social media post had 220 reactions and 63 comments and 2 reposts showing that the post elicited reactions on the online site.
18. Lastly, the Complainant adduced duly acknowledged Demand letter dated 10<sup>th</sup> November 2023 (page 11-16 of the supporting documents). The demand letter relates to the request to take down and immediately stop the publication of the Complainant's name and likeness in the Article titled "*Young smokers ditch shisha,*

*cigarettes for cigars. Are they aware of risks?"* dated 10<sup>th</sup> November 2023. The interview allegedly took place on or about July 2023 while the publication was conducted on or about 9<sup>th</sup> November 2023.

19. The Complainant further, *vide* affidavit dated 12<sup>th</sup> March 2024 availed a copy of her identity card and her passport photograph as annexures for purposes of proving that it was indeed her name, image and likeness used in the said Article by the Respondent.

## ii. THE RESPONDENT'S RESPONSE

20. The Respondent in its response objected to the jurisdiction of the Office for the reason that the contents of the Article authored on 9<sup>th</sup> November 2023 titled "*Young smokers ditch shisha, cigarettes for cigars. Are they aware of risks?"* does not fall within the definition of "data" as provided for under the Data Protection Act, 2019 (the "Act") since the contents were neither information which:-

- (a) was processed by means of equipment operating automatically in response to instructions given for that purpose;
- (b) was recorded with intention that it should be processed by means of such equipment;
- (c) was recorded as part of a relevant filing system;
- (d) since it did not fall under paragraphs (a) (b) or (c) above, did not form part of an accessible record; nor (e) was it recorded information which was held by a public entity and therefore did not fall within any of paragraphs (a) to (d).

21. The Respondent further objected to the jurisdiction of the Office by dint of the provisions of Sections 51(2)(b) and 52 (1)(a) and (b) of the Act. The applicable provisions of the Act that guide on processing of personal data are inapplicable since the Article was published in:-

- a) relation to literary material being the adverse effects of cigar smoking; and
- b) the public interest given that risks associated with cigar smoking invariably touch on public health.

22. In further response to the complaint, the Respondent states that contrary to the allegations made in the complaint, the Article was neither designed to attract controversy nor was it intended to secure commercial advantage to the Respondent. To the contrary, it was intended to inform the public about the risks associated with cigar smoking.
23. The Respondent position is that prior to publishing the Article, the Respondent, had become aware of the increased shift from shisha and cigarette smoking to cigar smoking by younger generation of smokers. It was further aware of the risks associated with cigar smoking including lung cancer, heart disease, infertility and risk of still birth and even death. As such, it came to the Respondent's knowledge that cigars are not a safe alternative to either cigarettes or shisha.
24. As such, whereas these younger generation of smokers have changed trend and gravitated towards cigar smoking due to its perceived aesthetic benefit, it nonetheless was incumbent upon the Respondent to discharge its journalistic duty by informing the public of the health risks associated with the change in trend.
25. The Respondent further avers that the Complainant, *vide* her social media pages including her Instagram profile "Cxxxx xxxx\_xe", (print-outs which were supplied to this Office) makes it indefeasibly clear that complainant is allegedly is a cigar enthusiast.
26. It is the Respondent's view therefore, the allegation that the Article has disparaged the Complainant's reputation in the way of her lawful occupation as a marketing professional and is therefore defamatory, is misplaced. Equally misplaced is the bare allegation of infringement of her right to privacy in this regard.
27. The Respondent also invites the Complainant to strictly prove the allegation that her alleged employer was left with the false impression that she is engaged in alternative employment or engagement (otherwise referred to as "moonlighting") as a sly comedian and that she is also a woman of loose morals in a sexual sense.

28. In respect of the allegation that the Article has attracted negative and/or derogatory comments from members of the public, the Respondent's position is that the public's perception of the Complainant is completely beyond the Respondent's control especially when weighed against the fact that she, even outside the Article, already publicized her liking towards cigar smoking.

29. As to the discussion that took place on or about July 2023 with one Mr. Sxxxx Mxxxxo who works for the Respondent, it is Respondent's position that:-

a) The Complainant was informed that the discussion was indeed a formal interview for purposes of the intended Article; and

b) At no point in time did the Complainant request the said Mr. Mxxxxo to refrain from publicizing her name on the Article and/or that her likeness should only be published with her approval.

30. In respect of the Complainant's consent, the Respondent's position is that the Complainant's consent was obtained. In any event, the provisions of Section 30(1) of the Act places a discretion on the Respondent to elect whether or not to secure the Complainant's consent if processing the information is for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; or if the processing is for the purpose of historical, statistical, journalistic, literature and art or scientific research as was in this particular case.

31. The Respondent avers that:-

a) The Complainant's consent and her control over the processing of her personal data was indeed obtained but, in any event, was not required. The allegation that the Article offended the provisions of Section 2 as read with Section 30 of the Act and the Office of the Data Protection Commissioner's (ODPC's) Guidelines on Consent is therefore without merit;

b) The manner of processing the Complainant's information did not contravene Section 25 of the Act with regard to fairness and proportionality; and

c) The manner of processing the Complainant's information did not patently contravene the minimum criteria set out in Section 2 of the Act and the ODPC Guidelines on Consent.

32. The Respondent states that they have put in place technological and organizational measures envisaged under the Act in order to address the risks and safeguards, security measures and mechanisms to ensure the protection of personal data and for compliance with the Act. In this regard, the Respondent has formulated internal policy guidelines that guide on the manner of collection and processing of personal data, which are:- a) Nation Media Group (NMG) Editorial Policy Guidelines and Objectives (Annexure A); and b) Nation Media Group (NMG) Privacy Policy (Annexure B).

33. The Respondent further avers that it conducts regular periodical training of its staff in respect of the policies and controls. In addition, the Respondent posits that it has an elaborate sanction mechanism which requires journalists and editors to ensure that a story, photograph or drawing/cartoon of questionable taste should have significant news value to justify its usage.

34. According to the Respondent, they have put in place guidelines which require its journalists to enquire if the publication of a photograph will be invasive of anyone's privacy. If it is established that there could be a potential invasion, the Respondent requires its staff members such as journalists to enquire whether the use of any such photo is nonetheless justified by a clear and indisputable public interest in doing so.

35. In addition to the above, and as a matter of policy, the Respondent states the they often requires that unless it is in the public interest, documents or photographs should be used only with the express consent of the owner. To this end, the Respondent has formulated Photo Release Forms (Annexure C) in order for the persons whose photographs are to be used to give our client and/or its employees and agents the permission to do the following:

- i. Photograph and or record their image and appearance on video tape, audio tape, film or photograph or other medium; and

- ii. Use the image, likenesses, voice (if any) and materials resultant from the activities mentioned above in connection with the publications for which the photograph has been taken whether or not such publication shall be for educational, advertising or other purposes connected with the business of our client.

36. According to the Respondent, the above measures adopted are fully in compliance with the Act, the Data Protection Regulations and the Guidance Notes on Consent. Additionally, on evidence as to whether the Complainant consented to processing of her personal data, the Respondent avers that upon receipt of the Complaint, it conducted internal investigations and established that the procedure leading to the publication of the Article was in keeping with its internal policies and the Act.

37. In particular, the Respondent states that it established that the Complainant provided her Consent to subjected to the interview and to have her name and likeness published in the Article. In any event and for the reasons stated under the above paragraph, the Complainant's consent would have been needless in the circumstances.

38. The Respondent states that whereas the Complainant asserts that she withdrew her consent, which is denied, it is clear that under Section 32(3) of the Act, the withdrawal of consent does not affect the lawfulness of processing based on prior consent before its withdrawal. In this regard, any withdrawal of the consent by the Complainant does not affect the lawfulness of the prior publication of the Article.

39. Without prejudice to the above, the Respondent asserts that even though the Complainant did not provide her written consent, the contents of the Article were framed in the public interest and as such, no consent was required prior to the publishing of the Article. This is expressly provided for under the provisions of Section 30(1)(b)(vi) and (viii) of the Act and Regulation 5 of the Data Protection (General) Regulations, 2021 (the "Regulations").

40. In respect of the alleged withdrawal of consent and objection to the processing of her data, it is the Respondent's position is that this was not possible for the following reasons:-

a) Under Section 36 of the Act, where a data controller or data processor demonstrates compelling legitimate interest for the processing which overrides the data subject's interests, the processing of the data may still be allowed despite the objection by the data subject. In this instance, the Respondent had compelling legitimate interests as the Article was made in the public interest.

b) Under Section 39(1)(d) of the Act, our client is allowed to continue retention of the data subjects since the data was being processed for journalistic purposes. Having published the Article on its online platform on 9 November 2023, the Act allowed our client to retain such data for journalistic purposes.

c) Under Section 52 of the Act, the principles of processing personal data shall not apply where the processing of the data was made for the publication for journalism purposes. In this case, since the Article was made in accordance with the right accorded to the Respondent under Article 34 of the Constitution of Kenya, such processing was exempt from the provisions of the Act.

41. The Respondent urged the ODPC to find that such exemption from the processing of personal data for journalistic purposes is not an unusual exemption and indeed as noted under Article 85(1) of the UK General Data Protection Regulation, the right to protection of personal data must be reconciled with the right to freedom of expression and information, including for journalistic purposes. These are known as the "special purposes".

42. In view of the foregoing, the Respondent states that it did not breach the rights of the Complainant, and as such, it is not liable as alleged by the Complainant or at all. In addition, the Complaint as filed does not disclose any legal injury, loss and damage which occasioned to the Claimant as a result of the alleged breach. As has been previously held by the Office. The Office of the Data Protection

Commissioner is divested of the jurisdiction to hear and determine claims for defamation and as such, the claim that the Respondent defamed the Complainant is unsustainable.

43. According to the Respondent, the allegation that the Complainant was not informed that she was being interviewed is incorrect and untrue. The Complainant was aware that she was being interviewed by a journalist and even agreed to take photographs for purposes of the magazine.

44. The Respondent avers that with regards to the mitigation measures, it did not breach the rights of the Complainant at all in the publication of the Article. Nonetheless, it has embarked on a process of training and developing its editorial staff and journalist on internationally recognised best practice standards on data protection law and the duties and ethics required of a journalist in line with its policies on Staff Development and the requirements of the Act.

45. In addition to the above, the Respondent states that it has commenced to put in place measures to promptly address any complaints raised by data subjects on a case-by-case basis. As can be noted from the Respondent's Privacy Policy, the Respondent has created the office of a Data Protection Officer to address issues touching on data protection and privacy that may have an overarching effect on its legal and institutional framework. The office has been equipped to handle future complaints to ensure minimal cases of breach of the rights of a data subject.

46. Other materials or evidence adduced in support of the Respondent's response include:- a) Nation Media Group (NMG) Editorial Policy Guidelines and Objectives; b) Nation Media Group (NMG) Privacy Policy; c) Sample Photo Release Forms; d) Audio clip of the interview that took place on or about July 2023; e) Instagram profile of the Complainant; f) Photographs of the Complainant duly supplied by her for purposes of the Article and g) an audio recording of the interview.

### iii. COMPLAINANT'S RESPONSE TO RESPONDENT'S RESPONSE

47. The Complainant *vide* a letter dated 18<sup>th</sup> March 2024 responded to the issues raised in the Respondent's response as follows:

#### a) On the issue of Jurisdiction

48. On the issue of the objection to the Office's jurisdiction, the Complainant opines that the jurisdiction of ODPC to investigate and determine complaints flows from Section 56(1) of the Data Protection Act (DPA).

49. Moreover, the Complainant quotes the provision of Section 2 of the DPA which defines "personal data" to mean "any information relating to an identified or identifiable natural person." It goes without saying that a natural person's name, image and likeness constitutes "information relating to" such a person. As such, these constitute "sensitive personal data" being information that would ordinarily reveal the Complainant's ethnic social origin and sex.

50. The Complainant further avers that crux of the complaint concerns the Respondent's decision to publish the Complainant's name, image and likeness in the Offending Article appearing on its website without the Complainant's prior informed consent and without any lawful justification whatsoever as well as the Respondent's subsequent refusal to comply with a lawful withdrawal of any purported consent.

51. The Complainant asserts that the Respondent's further objection to jurisdiction pursuant to Sections 51 and 52 of the DPA is equally without merit. Section 51 exempts processing of personal data that is necessary in the public interest. Section 52 on the other hand exempts principles of processing personal data where processing is undertaken for literary publication in the public interest where compliance with the DPA is inconsistent with such public interest and where it can be demonstrated that the processing is in compliance with any self-regulatory or issued code of ethics in practice and relevant to the publication in question.

52. The Complainant observes that it was not necessary in the public interest for the Respondent to publish the Complainant's name, image and likeness in the offending Article. The Article could have easily been published for the alleged goal

of informing the public of the adverse effects of cigar smoking without publishing the Complainant's name, image and likeness.

53. Further, the Complainant asserts that the Respondent has failed to demonstrate that publishing the Complainant's name, image and likeness was in compliance with any self-regulatory or issued code of ethics in practice and relevant to the publication in question. Section 52 of the Act therefore cannot apply to take away the ODPC's jurisdiction.

**b) Response to the other issues generally**

54. On the issue of consent, the Complainant avers that nowhere has the Respondent discharged its burden to prove that it previously obtained the Complainant's consent to publish her name, image and likeness in the Offending Article. The burden of proof is squarely on the Respondent pursuant to Section 32 of the Act.

55. Similarly, the Complainant avers that there is no evidence whatsoever that consent was given, whether written or otherwise. Neither did the Complainant agree to take photographs for purposes of the Offending Article as alleged and no evidence has been provided in support of this.

56. On the audio that was submitted by the Respondent on the alleged interview, the Complainant avers that the entirety of the Audio clip of the purported interview of the Complainant which has been provided by the Respondent does not in any way show that consent to publish her name, image and likeness was granted. At no juncture in the purported interview does the Complainant grant any consent whatsoever.

57. On the issue of the photo release forms as adduced by the Respondent, the Complainant avers that Respondent itself admits that its internal policy guidelines required it to obtain Photo Release Forms duly executed by the Complainant granting permission to Photograph and or record their image and appearance on video tape, audio tape, film or photograph or other medium; and Use the image, likenesses, voice (if any) and materials resultant from the activities mentioned above in connection with the publications for which the photograph has been taken whether or not such publication shall be for educational, advertising or

other purposes connected with the business of our client. However, no such executed Photo Release Form had been provided.

58. On the issue of the audio clip of the purported interview, the Complainant avers that it was illegally obtained and was a covert recording made without the Complainant's knowledge. The clip is clearly taken in a busy and noisy setting – undoubtedly a social engagement – without the Complainant being informed that a formal interview was being undertaken or that her conversation was being recorded.
59. On whether consent was not required falls flat according to the complainant because it has not been demonstrated what necessity, if at all, there was for the Complainant's name, image and likeness to be published in order to allegedly informing the public of the adverse effects of cigar smoking.
60. On whether the Offending Article was intended for commercial advantage, the Complainant relies on the High Court's finding in **Kamande v Nation Media Group (Constitutional Petition E004 of 2021) [2022] KEHC 16017 (KLR) (1 December 2022) (Judgment)**: "Moreover, the business daily is a newspaper widely circulated within the east African region and is sold at a certain fee. The juicier the stories and images supporting them, the more sales the respondent would achieve. It is the complainant's view that, the petitioner has demonstrated that the respondent stood to gain commercially from the publications."
61. On the issue of compensation, the Complainant has relied on various decisions from Courts and the ODPC which have established that nominal compensation for the breach of the right to privacy as set out in this Complaint lies between KES 1,000,000 and KES 2,000,000. (See **Kamande v Nation Media Group (Constitutional Petition E004 of 2021) [2022] KEHC 16017 (KLR) (1 December 2022) (Judgment)**; **Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited [2021] eKLR**; **Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] eKLR**; **Wanjiru v Machakos University (Petition E021 of 2021) [2022] KEHC 10599 (KLR) (3 August 2022) (Judgment)**; and **OPDC Complaint 1994 of 2023, David Owuor & Others v Ceres Tech Limited**).

62. Lastly, the Complainant avers that she has suffered significant emotional and psychological distress, reputational damage and loss of employment and employment prospects arising from the impugned publication. In the circumstances, Complainant prays that this conduct be taken into account and an award of compensation in the sum of **KES 2,000,000.00** be made in the Complainant's favour.

#### **F. ISSUES FOR DETERMINATION**

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

- i. Whether ODPC has jurisdiction to handle the complaint.
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

#### **I. WHETHER ODPC HAS JURISDICTION TO HANDLE THE COMPLAINT**

64. The Respondent challenged the jurisdiction of this Office to handle the complaint on two main grounds namely;

- a. Whether the Article falls within the definition of data; and
- b. Whether the Article falls within the exemptions provided for under Sections 51 (2)(b) and 52(1)(b) of the Act.

##### Whether the Article falls within the definition of data

65. The Respondent alleged that the Article authored on 9<sup>th</sup> November 2023 titled "*Young smokers ditch shisha, cigarettes for cigars. Are they aware of risks?*" does not fall within the definition of "**data**" as provided for under the Data Protection Act, 2019 (the "Act") since the contents were neither information which:-

- (a) was processed by means of equipment operating automatically in response to instructions given for that purpose;
- (b) was recorded with intention that it should be processed by means of such equipment;
- (c) was recorded as part of a relevant filing system;

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(d) since it did not fall under paragraphs (a) (b) or (c) above, did not form part of in accessible record; nor (e) was it recorded information which was held by a public entity and therefore did not fall within any of paragraphs (a) to (d).

66. On this limb, the Office finds that since the alleged Article contained the Complainant's name, image and likeness, the same constituted aspects personal data as defined under Section 2 of the Act which cannot be ignored. "**Personal data**" means any information relating to an identified or identifiable natural person. Similarly, the information involved processing of the said personal data which involved disclosure by transmission, dissemination or otherwise making available thereby making the said information accessible.

67. Consequently, had the Article contained general information that is not kept in any identifiable form then the same would be outside the ambit of the Act.

68. Therefore, objection to the jurisdiction of this Office upon this ground falls.

Whether the Article falls within the exemptions provided for under Sections 51 (2)(b) and 52(1)(b) of the Act.

69. The second limb on the objection of the jurisdiction of the Office was on the basis of exemptions under Section 51 (2)(b) and Section 52(1)(b) of the Act.

70. Section 51 (1)(b) of the Act sets out the General Exemptions to the Act and provides that processing of personal data is exempt from the provisions of the Act if it is necessary for national security or public interest.

71. The Data Protection (General) Regulations 2021 under Regulation 55 provides for exemptions for public interest for purposes of Section 51(2)(b) of the Act where such processing exists as:

- a) Permitted general situation; and
- b) Permitted health situation.

72. Regulation 56 The Data Protection (General) Regulations 2021 provides that a permitted general situation referred to under Regulation 55(a) relates to the collection, use or disclosure by a data controller or data processor of personal data about data subject including for lessening or preventing a serious threat to

the life, health or safety of any data subject, or to public health or safety amongst others.

73. Regulation 57 of the said Regulations provide for permitted health situation referred to under Regulation 55(b) to relate to the collection, use or disclosure by a data controller or data processor of personal data about a data subject, including for the collection of health information to provide a health service; the collection, use, or disclosure of health data is for health research and related purposes; the use or disclosure of genetic information where necessary and obtained in course of providing a health service; the disclosure of health information for a secondary purpose to a responsible person for a data subject.

74. A permitted health situation under Regulation 57 applies where a data controller or data processor discloses health data about a data subject, and they provide a health service to the data subject; the recipient of the personal data is a responsible person for the data subject; a data subject is either physically or legally incapable of giving consent to the disclosure, or physically cannot communicate consent to the disclosure.

75. The Office observes that from the two permitted public interest parameters in Regulation 55 of the Data Protection (General) Regulations, it is clear that the complaint in question does not fall under the permitted health situation exemption.

76. On the other hand, Section 52 (1)(b) of the Act provides for exemptions in relation to **journalism, literature and art** as follows:

(1) The principles of processing personal data shall **not** apply where — (a) processing is undertaken by a person for the publication of a literary or artistic material;

**(b) data controller reasonably believes that publication would be in the public interest; and**

(c) data controller reasonably believes that, in all the circumstances, compliance with the provision is incompatible with the special purposes.

**(2) Subsection (1) (b) shall only apply where it can be demonstrated that the processing is in compliance with any self-regulatory or issued code of ethics in practice and relevant to the publication in question.**

*[Emphasis]*

77. It is imperative to note that although Section 52(1)(b), provides for exemptions in processing of personal data with regards to journalism, the same is not a blanket exemption. There are two parameters that have to be met as espoused above as follows:

- i. Where the data controller reasonably believes that publication would be in the public interest; and
- ii. Where the processing is in compliance with any self-regulatory or issued code of ethics in practice and relevant to the publication in question

**a) Where the data controller reasonably believes that the publication would be public interest**

78. The Black Law Dictionary 9<sup>th</sup> edition defines "public interest" as, "*...The general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially which justifies Governmental regulation.*

79. The Respondent's Editorial Policy Guidelines and Objectives, specifically Part III thereof, provides for **Ethical Principles: Code of Conduct and Ethics for NMG Journalists** and speaks to what public interest entails. Public interest has been codified to include: **Detecting or exposing crime or serious misdemeanor or anti-social conduct; protecting public health or safety;** preventing the public being misled by some statement or action of an individual.

80. The Respondent stated that the Article was published in view of public interest as it had become aware of the increased shift from shisha and cigarette smoking to cigar smoking by younger generation of smokers. Further, it became aware of the risks associated with cigar smoking including lung cancer, heart disease, infertility and risk of still birth and even death. As such, it came to the

Respondent's knowledge that cigars are not a safe alternative to either cigarettes or shisha which the public ought to have known.

81. The Office finds that in that regard, the Article raised issues to protect public health and safety which can be regarded as public interest.

**b) Where the processing is in compliance with any self-regulatory or issued code of ethics in practice and relevant to the publication in question**

82. The Office notes that the Respondent provided its editorial policy which contains the **Ethical Principles: Code of Conduct and Ethics For NMG Journalists** at Part III. The Office finds that the same is a self-regulatory code of ethics in practice.

83. The NMG Code of Ethics provides for misrepresentation clause which is pertinent in this complaint as follows:

**Misrepresentation**

1. Journalists should generally identify themselves and not obtain or seek to obtain information or pictures through misrepresentation or subterfuge.
2. Unless in the public interest, documents or photographs should be used only with the express consent of the owner.
3. Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means. The **public interest** includes: Detecting or exposing crime or serious misdemeanor or anti-social conduct; protecting public health or safety; preventing the public being misled by some statement or action of an individual.

84. In view of the above provision, the NMG code of ethics provides that where a publication is done in view of public interest, the express consent of the owner is not required.

85. Similarly, the NMG Code of Ethics provides for Privacy as follows:

**Privacy**

The public's right to know often needs to be weighed vis-à-vis the privacy rights of people in the news. Intrusion and inquiries into an individual's private life

without the person's consent are not generally acceptable unless public interest is indisputably involved. Public interest must itself be legitimate and not merely based upon prurient or morbid curiosity. Things concerning a person's home, family, religion, tribe, health, sexuality or sexual orientation, personal life and private affairs are covered by the concept of privacy excepting where these impinge or can reasonably be presumed to impinge upon the public well being.

86. In view of the foregoing, intrusion and inquires into an individual's private life without a person's consent are not generally acceptable unless public interest is indisputably involved.
87. Consequently, this Office finds that since the said publication spoke to the health hazards of Cigars, the same would be an important aspect of education to the general public. Therefore, the Complainant's consent was not required where the publication was being done in view of public interest.
88. The Respondent has demonstrated that the publication was in public interest and further that there is the NMG Code of Ethics as contained in its Editorial Policy under Part III.
89. In the ultimate, the Office finds that the second limb of the objection to the Office's jurisdiction is allowed. The Office finds that it lacks jurisdiction to determine the complaint on account of the exemption provided for under Section 52 (1)(b) of the Act.

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

90. 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.
91. The Complainant sought for compensation in the figure of Kshs. 2,000,000.00 as she has suffered significant emotional and psychological distress, reputational damage and loss of employment and employment prospects arising from the impugned publication.

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92. 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." Section 65(4) of the Act states that, "damage includes financial loss and damage not involving financial loss, including distress." Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

93. The Office finds that since it lacks jurisdiction to determine the complaint, it also lacks the authority to issue a remedy to the Complainant.

#### **G. FINAL DETERMINATION**

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

- i. The Complaint is dismissed.
- ii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 20<sup>th</sup> day of March . 2024.



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**IMMACULATE KASSAIT, MBS**  
**DATA COMMISSIONER**

