



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 1962 OF 2023**

**BENSON ADIE.....COMPLAINANT**

**-VERSUS-**

**SEQUOIA HEIGHTS INTERNATIONAL SCHOOL .....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 Office received a complaint on 9<sup>th</sup> October 2023 against the Respondent alleging that the Respondent submitted his personal details in an Assessment Report to register the school without his 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 '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. 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 (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 9<sup>th</sup> October 2023. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainant who was the 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 6<sup>th</sup> November 2023 referenced **ODPC/CONF/1/5 VOL 1 (533)**. 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 Respondents were asked to provide this Office with the following:
  - a. A response to the allegation made against them by the Complainant;
  - b. Any relevant materials or evidence in support of the response;
  - c. The mitigation adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint do not take place again; and
  - d. The contractual agreement (if any) between you and the Complainant allowing you to share his personal data with third parties.

8. The Respondent responded to the notification of complaint letter *via* a letter dated 18<sup>th</sup> November, 2023
9. 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.

#### **D. NATURE OF THE COMPLAINT**

10. The Complainant stated that the Respondent used his credentials to seek approval from the Ministry of Education (hereinafter referred to as 'the Ministry') through the County Education Board as the principal of the school without following due procedure.
11. The Complainant also stated that the Respondent used his name and photo on the school's official website as the principal without his consent and passed on his name as the principal of the school on their social media networks without his approval.

#### **E. SUMMARY OF EVIDENCE ADDUCED**

##### **i. THE COMPLAINANTS' CASE**

12. The Complainant alleged that the Respondent used his name and photo on its official website as the principal without his consent. He indicated the link of the official site of the school.
13. He also alleged that the Respondent was passing on his name as the principal on their social media platforms without his consent. He included a link to a Facebook page as proof of the same.
14. The Complainant indicated that he made attempts to discuss the matter with the Respondent to no avail. He attached a demand letter to the Respondent as proof of the same.

15. The Complainant also attached a School Registration Assessment Report dated 24<sup>th</sup> August 2023 for the Respondent with his name as the principal.

16. The Complainant prayed for an order of compensation from this Office.

## **ii. THE RESPONDENT'S RESPONSE**

17. The 1<sup>st</sup> Respondent was sent a notification on the 6<sup>th</sup> of November 2023 and responded, through its advocates, vide a letter dated 18<sup>th</sup> November 2023.

18. The Respondent denied the allegations made by the Complainant and stated that it did not use the credentials of the Complainant as alleged when seeking approval from the Ministry. Further, the Respondent attached a copy of a report showing the credentials of the officers it used to seek approval.

19. The Respondent further claimed that it was not aware of such websites and Facebook account allegedly operated under its name.

20. The Respondent stated that the burden of proving the allegations lies with the Complainant.

## **F. INVESTIGATIONS UNDERTAKEN**

21. The Facebook page link provided by the Complainant had the Complainant's image in a video and further the said video indicated his name referencing to him as the principal of the school posted by the Respondent therefore confirming that indeed the Respondent had used the Complainant in a video.

22. Additionally, upon receiving the Respondent's response, this Office sought to find out the owner of the alleged website. It was discovered that the host of the website was Kenya Network Information Center (KeNIC).

23. Through an email dated 18<sup>th</sup> December 2023, this Office requested KeNIC to confirm ownership of the website in question.

24. KeNIC confirmed that the website was owned by the Respondent.

25. Upon further scrutiny and through the information gathered by this Office in its investigations, it was discovered that the email address used to register the Respondent's domain was the same email address indicated in the report submitted to this Office by the Respondent to prove that they did not use the Complainant's details.

26. Additionally, the phone number on a form submitted by the Respondent to this Office is the same as one contained on the alleged website which they claim they were not aware of.

27. Lastly, the Office noted that the video from Facebook and the image of the Complainant from the website have since been pulled down.

#### **G. ISSUES FOR DETERMINATION**

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

- i. Whether the Respondent fulfilled its obligations under the Act; and
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

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

29. Section 25 (c) of the Act states that a data controller or processor shall ensure that personal data is collected for explicit, specified and legitimate purposes and **not further processed** in a manner incompatible with those purposes.

The Respondent should not have further processed the Complainant's personal data after his employment did not materialize. They should have stopped processing at that point and not use his image or his details in their endeavours.

30. The Act under Section 37 (1) (a) provides 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 a data subject.

31. From the evidence adduced by the Complainant, it is clear that he gave the Respondent his personal details for employment purposes, which employment did not materialise.
32. The Complainant submitted a report dated and signed 24<sup>th</sup> August 2023 to the Ministry of Education yet his employment was to commence on 15<sup>th</sup> July 2023 as per the evidence adduced to this Office. However, this Office shall not delve into the employment issues seemingly being the main concern of the Complainant, but will concern itself with the use of his personal details in the Respondent's website and Facebook page by passing him off as the Principal, yet his employment never commenced.
33. Furthermore, Section 32 of the Act gives the conditions of consent and states that a data controller or processor **shall bear the burden of proof** for establishing a data subject's consent to the processing of their personal data for a specified purpose. The assertion from the Respondent that the Complainant bore the burden of proof in this case is false. The Act puts the burden upon the Respondent, as the data controller or data processor to prove that they sought express consent from the data subject to process their personal data.
34. From the investigations undertaken, the Office noted that the said video and images have since been pulled down. However, this doesn't negate the fact that his express consent was not sought when using his personal information for commercial purposes as provided under section 37(1)(a) of the Act.
35. In view of the foregoing, the Respondent therefore failed to discharge this burden and as such, failed to fulfil its obligations under the Act in obtaining the Complainant's consent when using his personal information for commercial purposes.

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

36. 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. The Complainant had requested for an order for compensation in that regard.
37. Section 65 (1) of the Act provides for compensation to a data subject and states that 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.
38. Regulation 14 (3) (e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
39. The Complainant's rights were infringed upon and the Respondent used his image and personal details for commercial use without the express consent of the Complainant. In this regard, the Complainant is to be compensated **Kshs. Five Hundred Thousand Shillings only (Kshs. 500,000)**.

## **H. FINAL DETERMINATION**

40. The Data Commissioner therefore makes the following final determination;
- i. The Respondent, Sequoia Heights International School is hereby found liable for using the Complainants' image for commercial gain without their knowledge and consent thereby violating his rights as envisaged in the Data Protection Act No. 24 of 2019.
  - ii. The Respondent is hereby ordered to compensate the Complainant a sum of **Kshs. Five Hundred Thousand Shillings only (Kshs. 500,000)**; and

- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 6<sup>th</sup> day of January 2024.



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**IMMACULATE KASSAIT, MBS  
DATA COMMISSIONER**

