



**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 2295 OF 2023**

GRACE MWENDE CHAMBI.....COMPLAINANT

-VERSUS-

CECILIA MUNYORO T/A "GLAM BY CESS"1ST RESPONDENT

JOHN IRUNGU T/A "VEEJAYSTUDIOS"2ND 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 7th November 2023 alleging the Respondents published her photographs and that of her children on their social media pages without 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 7th November 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 letters dated 6th December 2023 referenced ODPC/CONF/1/5 VOL 1 (614) and ODPC/CONF/1/5 VOL 1 (615). In the notification of the complaint, the Respondents were 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 lawful basis relied upon to continue using the Complainant's image despite her objection of the same; and

d. 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.

8. The Respondents responded to the allegations *vide* a letter dated 18th December 2023
9. This determination is pegged on the provisions of Regulation 14 of the Regulations which state 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 lodged her complaint and attached demand letters sent to the Respondents requesting removal of the photographs from their Instagram pages.
11. She also provided screenshots of her conversation with the 1st Respondent requesting to have the photographs deleted or pulled down from the Instagram page and screenshots of the 2nd Respondent's Instagram page having posted her and her family allegedly, without her consent, and continuing to have them on his page after requesting to have the photographs pulled down.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

12. The Complainant stated that she had a photo session with her family at the 2nd Respondent's studio on 22nd April 2023. The photo session was fully paid for and no consent was given by her to have the photographs published or disseminated in any form of media.
13. The Complainant stated that on 4th June 2023, she granted consent to the 1st Respondent to use the family photographs for promotional purposes. However, on 28th August 2023, the Complainant wrote to the 1st Respondent requesting to have the photographs removed due to invasion of her privacy caused by publishing of the photographs on the 1st Respondent's Instagram business page.

14. The Complainant alleged that she did not consent to the publication of her family photographs by the 2nd Respondent and paid in full for the photography services obtained from them. Despite the lack of consent, the Complainant became aware that the 2nd Respondent had used her family photographs, which included her minor children, to promote his business and advertise his services without express consent from the Complainant.
15. The Complainant stated that she wrote to the Respondents on 20th September 2023 requesting the removal of the family photographs from their respective Instagram pages to no avail.
16. The Complainant alleged that the Respondents refused to pull down the photographs as directed in exercise of her rights under Sections 26 (c), 32 (2) and 36 of the Act.
17. She stated that the refusal of the Respondents to remove the photographs has led to a continual breach of hers and her children's privacy contrary to Section 26 (a) of the Act as it exposed her to numerous followers of the images of the Complainant and her children.
18. The Complainant stated that the continued publication of the photographs on the 1st Respondent's page was a breach and violation of Section 30 (1) (a) as it was done without the consent of the Complainant.
19. The Complainant alleged that the Respondents continued to commercialize, advertise and promote their businesses using hers and her children's photograph despite her continued protest and demands for the same to be deleted and all promotions using the photographs to cease, which according to her was a breach of Sections 33 (1) (a) and 37 (1) (a) of the Act and violates the Complainant's rights as a data subject.
20. The Complainant sought that the Respondents remove all hers and her family's photographs currently published on their pages and that each Respondent compensates her Kshs. 2,000,000 for breach of her privacy and generation of income based on publishing of the photographs.

ii. THE RESPONDENTS' RESPONSE

21. The 1st Respondent stated that she is indeed the owner of the Instagram page going by the name "Glam by Cess" and is also a partner at Veejaystudios – the 2nd Respondent herein- through a partnership business registered in Kenya which runs an Instagram page by the name "veejaystudios".
22. The 1st Respondent denied any wrongdoing and maintained that she obtained explicit consent from the Complainant to post the photographs in question on both the Respondents' pages as evidenced in the Complainant's complaint form.
23. The 1st Respondent stated that the Complainant reviewed the photographs taken of her and her family and went ahead to select the ones she felt were best and asked the 1st Respondent to share them on her Instagram pages.
24. The 1st Respondent attached screenshots of a conversation between herself and the Complainant regarding which photographs were to be shared.
25. The 1st Respondent stated that she has always respected the privacy rights of individuals and would not intentionally infringe upon them.
26. Further, the 1st Respondent alleged that a few months later, after she had posted the Complainant's photographs with her express consent, the Complainant expressed her discomfort with the photographs being available on her Instagram page. The 1st Respondent then indicated that she would resolve the issue.
27. The 1st Respondent alleged that she took the initiative to lock her account in case it was running an advertisement without her knowledge which would have led to the Complainant's photographs appearing on the search tab on the Instagram application.
28. The 1st Respondent stated that she also went ahead to ensure that the Complainant's photographs were deleted from both hers and the 2nd Respondent's accounts before unlocking her page.
29. The 1st Respondent denied the Complainant's assertions that she refused to pull down the photographs and that upon having a conversation with the

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Complainant about the photographs, she ensured the photographs were pulled down from both Instagram pages.

30. The 1st Respondent provided a link to her Instagram page evidencing that the Complainant's photographs were no longer published on her page.

31. The 1st Respondent also denied that she used the Complainant's photographs to commercialize, advertise and or promote her business as the publication was within the bounds of the consent obtained from the Complainant and that the publication was to reflect the positive experience that the Complainant had with the Respondents' photography and styling services.

32. The 1st Respondent stated that she values her reputation and take any allegation of non-compliance seriously hence the quick action they took to ensure that the Complainant's photographs were pulled down from the pages despite having initial consent from the Complainant to share the photographs.

F. ISSUES FOR DETERMINATION

33. In light of the above, 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 Respondents fulfilled their 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

34. Section 26 of the Act provides for the rights of a data subject under the Act. As such, the Complainant had the right to object to the processing of all or part of her personal data. Personal data is defined under Section 2 of the Act as any information relating to an identified or an identifiable natural person.

35. Further, Section 40 (1) (a) of the Act provides for the right of rectification and erasure and states that a data subject may request a data controller or data

processor to rectify without undue delay personal data in its possession or under its control that is inaccurate, out-dated, incomplete or misleading.

36. Regulation 12 (1) (b) of the Data Protection (General) Regulations, 2021 (the 'General' Regulations) provides that pursuant to Section 40 (1) (b) a data subject may, request a data controller or processor to erase or destroy personal data held by the data controller or processor where the data subject objects to the processing of their data and there is no overriding legitimate interest to continue the processing and the processing of personal data is for direct marketing purposes and the individual objects to that processing.

37. The Complainant in this case is a data subject as per the definition of the Act and was well within her rights in requesting the Respondents to pull down her photographs from their Instagram pages.

38. From the 1st Respondent's response, and investigations conducted by this Office to ascertain whether the photographs were still up on the Respondents pages, the Respondents pulled down the Complainant's photographs from their pages.

39. However, the Act stipulates that once a data subject objects to the processing of their personal data, the data controller or processor should erase the data subject's personal data without undue delay.

40. The Complainant requested her photographs to be pulled down on 28th August 2023, 3rd September 2023 and 7th September 2023 and sent a demand letter, through her advocates, on 20th September 2023. The Respondents refused and/or neglected to pull down the photographs necessitating the Complainant to lodge a complaint with this Office on 7th November 2023. It was until this Office notified the Respondents of the complaint on 6th December 2023 that they acted upon the Complainant's request to pull down her photographs from their Instagram pages.

41. The Respondents did not prove that there was any overriding legitimate interest to continue having the Complainant's photographs on their pages for slightly over three months since she objected to the publication of her photographs on the Respondents' pages and withdrew her consent.

42. In this regard, the Complainant's rights were violated in terms of the undue delay in which the Respondents had her photographs on their pages after she objected to the publication and withdrew her consent.

II. WHETHER THE RESPONDENTS FULFILLED THEIR OBLIGATIONS UNDER THE ACT

43. The Respondents are data controllers and data processors within the definitions of the Act and therefore have obligations pursuant to the Act.

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

45. The conditions of consent are provided under Section 32 of the Act which provides that a data controller and processor shall bear the burden of proof to establish that the data subject consented to the processing of their personal data for a specified purpose. Subsection 2 states that unless provided under the Act, a data subject shall have the right to withdraw consent at any time.

46. The 1st Respondent in this case discharged the burden of proof in establishing that the Complainant indeed consented to having her photographs published on the 1st Respondent's Instagram page. However, the 2nd Respondent did not prove that he had the Complainant's consent to publish her photographs on his Instagram page.

47. Further, the Complainant withdrew her consent once she stated that she was uncomfortable with her photographs being on the Respondents' Instagram pages. She requested the Respondents to delete her photographs from their Instagram Pages. She exercised her right under the Act which the Respondents failed to uphold for slightly over three months.

48. Therefore, this Office finds that the Respondents, much as they deleted the photographs from their Instagram pages as at the date of this determination,

delayed to act upon the Complainant's request when she withdrew her consent and therefore, failed to fulfil their obligations under the Act.

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

49. 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.

50. The Complainant sought that the Respondents remove all hers and her family's photographs published on their pages. As indicated above, this was done by the Respondents.

51. The Complainant also sought that each Respondent to pay her damages of Kshs. 2,000,000 for breach of her privacy and generation of income based on the publication of her photographs on the Respondent's Instagram pages.

52. Section 65 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.**"*

Further, Regulation 14 (3) (e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

53. Specific damages must, however be justified and quantified. The Complainant did not provide evidence of financial loss or distress to justify compensation in the amount of Kshs. 2,000,000.

54. That notwithstanding, the Respondents were found liable for violating the Complainant's rights by delaying in pulling down her photographs from their Instagram pages. Therefore, the Respondents are hereby ordered to each pay

the Complainant **Kshs. 25,000 (Twenty Five Thousand Shillings Only)** as nominal damages.

55. Pursuant to Regulation 14 (2) (e), this Office directs the Respondents in this case to put in place clear consent mechanisms for publishing data subject's images and photographs on their social media pages. The consent mechanisms should also provide for the withdrawal of consent and should be acted upon within the timelines stipulated under the Act and the Data Protection (General) Regulations, 2021.

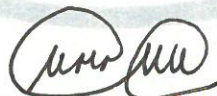
56. Additionally, and relevant to this particular complaint, the Respondents are also guided to strictly adhere to the principles of data protection and to have measures that are in line with data protection by design and by default under the Act to avoid complaints of this nature and administrative fines that are likely to be imposed upon them in the event this Office receives similar complaints.

G. FINAL DETERMINATION

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

- i. The Respondents are found liable for infringement of the Complainant's rights and violation of its obligations under the Act;
- ii. The Respondents are hereby ordered to compensate the Complainant **Kshs. 25,000 (Twenty Five Thousand Shillings only)** each; and
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 2nd day of February, 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER