



**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 2369 OF 2023**

DIANA HASHINA AMBANI.....COMPLAINANT

-VERSUS-

ACAKORO FOOTBALL CLUB.....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 16th November 2023 alleging that the Respondent continued to use the Complainant's image for commercial purposes despite termination of a contract between the parties.

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 16th 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* a letter dated 6th December 2023 referenced ODPC/CONF/1/5 VOL 1 (612). 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 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 images after the lapse of the contract; 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 27th 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 through her advocates pursuant to Regulation 4 (3) of the Enforcement Regulations which state that a complaint may be lodged by a person acting on behalf of the Complainant.

11. The Complainant alleged that the Respondent continued to use her images for commercial purposes. The Complainant alleged that she was contracted by the Respondent *vide* a contract dated 25th October 2014 while she was still a minor. She stated that the said contract provided that the Respondent would use her images for commercial purposes without compensation.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

12. The Complainant stated that she was contracted by the Respondent *vide* a contract dated 25th October 2014 while she was still a minor. The contract indicated that the Respondent would use the Complainant's image for commercial purposes without compensation.

The Complainant availed the contract dated 25th October 2014 as proof of the same. The contract was between the Respondent, the Complainant and her parent/guardian.

13. However, by virtue of a letter dated 25th July 2020, the Complainant stated that she was released from the Respondent's Football Club and therefore all parties' contractual obligations were discharged from the said date.

The Complainant availed the release letter dated 25th July 2020 as proof of the same.

14. The Complainant stated that since the release date, the Respondent continued to use her images for commercial purposes and for gain without the consent of

the Complainant or her guardian. Further, she alleged that her images were used by the Respondent's branch based in Austria for purposes of getting funding.

The Complainant attached several documents indicating an invitation to a Golf Tournament and several images with a banner allegedly containing the Complainant's image.

15. The Complainant requested for compensation for continued use of the Complainant's image from 2020 till the date of the complaint.

ii. THE RESPONDENT'S RESPONSE

16. The Respondent stated that the contract referenced in the complaint terminated in 2018 prior to the alleged breaches and therefore should not form the basis of the complaint. Further, the Respondent indicated that there was a new contract between themselves and the Complainant dated 8th August 2018.

17. The said contract was signed by the Complainant's guardian as she was still a minor at the time of entering the Agreement. The new agreement stated that it superseded all other agreements entered into between the parties pursuant to Clause 13.1 of the Agreement. The Respondent therefore requested that the previous contract dated 25th October 2014 be disregarded.

The Respondent attached the Agreement dated 8th August 2018 as proof of the same.

18. The Respondent indicated that it is a charitable organization which provides football training, education, mentorship, health care and a feeding program to 150 children. The Respondent indicated that it runs its programs with donations received from well-wishers and partners who fundraise for the Academy and that its main sponsors and founder are based in Austria.

The Respondent attached its profile as part of its evidence adduced to this Office.

19. The Respondent denied that it continued to use the Complainant's image for commercial purposes. Citing Regulation 14 of the Data Protection (General)

Regulations, 2021 (the General Regulations), the Respondent stated that the use of personal data for commercial purposes arises "*where personal data of a data subject is used to advance a commercial or economic interest including inducing another person to buy, rent, lease, join, subscribe to, provide or exchange products, property, information or service, or enabling or effecting, directly or indirectly, a commercial transaction.*"

20. The Respondent indicated that it is a charity and not a commercial venture and the children it supports do not pay for any of the services provided because they are beneficiaries of the charity.

21. The Respondent confirmed that the Complainant was a beneficiary of the charity from 2014 to 2020 when her school fees was last paid for her tertiary education. The Respondent stated that there was never a commercial transaction in relation to the image of the Complainant.

The Respondent attached copies of the receipts in relation to the payment of the Complainant's fees.

22. The Respondent stated that based on the Agreement with the Complainant dated 8th August 2018, they obtained the image of the Complainant by the consent granted under clause 4.2 of the Agreement which provides that:

*"The Player hereby grants to the Club the right to photograph the Player both individually and as a member of a squad and to use such photographs and the Player's Image in a Club context in connection with the promotion of the Club and its playing activities and the promotion of the League and the manufacture sale, sale, distribution, licensing, advertising, marketing and promotion of the Club's club branded and football related products (including the strip) or services (including such products or services which are endorsed by or produced under license from the Club) in relation to the League's licensed products services and sponsors in such a manner as the Club may reasonably think fit so long as the Player's photograph and/or player's image shall not be used to imply any brand or product endorsement by the player; and PROVIDED that all rights shall cease on termination of this contract, **save for the use and/or sale of any promotional materials or products as aforesaid as***

shall then already be manufactured or in the process of manufacture or required to satisfy any outstanding orders." (emphasis by the Respondent)

23. The Respondent reiterated that the Agreement was signed on behalf of the Complainant in 2018 by her guardian/mother and the consent was never withdrawn and that the consent fulfilled the requirements of Section 33 of the Act.

24. Further, the Respondent stated that a personal data breach is defined under the Act as "*a breach of security leading to accidental or unlawful destruction, loss, alteration, **unauthorised disclosure** of or access to, personal data transmitted, stored or otherwise processed*". (emphasis by the Respondent)

In this case, the Respondent stated that there was written consent to obtain and use the image as indicated in the Agreement.

25. The Respondent denied continuously using the Complainant's image for commercial purposes and maintained that the image was taken in 2018 after the Agreement was signed. The image, as per the Respondent, was then used in rollup banners which were displayed during their events from 2018 to 2022 pursuant to the consent duly given by her guardian under the Agreement.

26. The Respondent agreed that the Complainant was issued with an unconditional release letter allowing her to join any club of her choice which according to them was in fulfilment of the contractual obligation that it had with the Complainant. However, the Respondent stated that the consent in relation to the images that were already taken and used in the rollup banners was not withdrawn.

The Respondent drew this Office's attention to Clause 4.2 of the Agreement which provided that "*all rights shall cease on termination of this contract, save for the use of any promotional materials or products as aforesaid as shall then already be manufactured or in the process of manufacture or required to satisfy any outstanding orders.*"

11/

27. The Respondent therefore denied the allegation that it continued to use the Complainant's image without consent from 25th July 2020 when she was issued with the release letter. They stated that the roll up banner with the Complainant's image was part of promotional material that was displayed during the Academy events between 2018 and 2022.

28. The Respondent stated that it only used the image in a rollup banner to limit the circulation of the image and it was with the consent of the Complainant. However, the Respondent indicated that during annual fundraising charity events, a photo of the rollup banner alongside other participants in the fundraising events was taken by journalists who published the photo of the rollup banner alongside other participants as news items. The Respondent stated that this was lawful pursuant to Section 30 (1) of the Act.

29. Further, the Respondent stated that under Section 30 (1) (b) of the Act, the processing of the Complainant's image was necessary;

- a. For the legitimate interests pursued by itself as a charity which the Complainant was a beneficiary of the programs and her school fees and school uniforms were provided by the Respondent. The rollup banner with her image was used in fund raising events for these charitable purposes which benefitted the Complainant and other children.
- b. For the performance of a task carried out in public interest – the image was used in a fundraising event in support of the charitable causes to benefit less fortunate children.
- c. To protect the vital interests of the Complainant – to raise funds and pay school fees, provide healthcare, food, mentorship and football training for the Complainant and other children who benefitted from their program.
- d. For journalistic purposes. The rollup banner was photographed by journalists who published the news regarding the fundraising events for charitable purposes in different years between 2019 and 2022 when the banner was used.

30. The Respondent stated that following this complaint, it destroyed the rollup banners bearing the Complainant's image and her image shall not be displayed in any of their events either alone or with others.
31. The Respondent stated that the complaint is malicious and without merit and ought to be dismissed.

F. INVESTIGATIONS UNDERTAKEN

32. Pursuant to Regulation 13 (3) of the Enforcement Regulations, the Data Commissioner, in conducting investigations, is to be guided by the provisions of the Fair Administrative Action Act, 2015. Based on the Respondent's response, it was prudent to get a rejoinder response from the Complainant on certain issues relevant to the investigations of this complaint.
33. This Office sought a response from the Complainant specifically on Clauses 2.2 and 4.2 of the contract dated 8th August 2018 which provided for duration of the contract and use of the Complainant's image.
34. On Clause 2.2, the Complainant stated that the Complainant was released unconditionally from the Respondent club vide a release letter dated 25th July 2020 and since that date, she never participated in any activities related to the Football Club. The Complainant indicated that she was seventeen (17) years old at the date of release. Additionally, the Complainant stated that the release from the Club meant termination of any contractual obligations between the parties. Therefore, because there were no contractual obligations between the parties upon release of the Complainant, the clause does not apply in the circumstances.
35. On Clause 4.2, the Complainant averred that the said photograph was taken during the subsistence of the contract dated 25th October 2014. The duration of the contract was until the Complainant reached eighteen (18) years of age which would mean that the contract would be terminated in 2021. However, before she reached eighteen, the Complainant was issued with a release letter on 25th July 2020 and therefore the contract attached by the Respondent should not be admitted.

36. The Complainant denied the existence of the contract dated 8th August 2018 because according to them, the contract would not have been entered into unless and until the former contract had lapsed. The Complainant stated that her image was used to show an element of vulnerability and thus raise funds whilst she was not within the Respondent's program.

37. The Complainant directed this Office to clause 8 of the contract dated 25th October 2014 and stated that the use of the Complainant's image did not extend to when the relationship between the parties had lapsed by whichever means either through release, termination or expiry of the contract. The Complainant reiterated her position that her image was used in Austria, outside the jurisdiction of Kenya between 2021 and 2022 during a golf event for purposes of raising funds yet she was no longer involved in the activities of the Respondent.

G. ISSUES FOR DETERMINATION

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

- i. Whether there was unlawful use of the Complainant's image by the Respondent; and
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THERE WAS UNLAWFUL USE OF THE COMPLAINANT'S IMAGE BY THE RESPONDENT

39. In order to answer this question, it is prudent to analyze relevant clauses of the contracts submitted by both the Complainant and the Respondent. The Complainant submitted a contract dated 24th October 2014 and the Respondent submitted a contract dated 8th August 2018. For purposes of this analysis the contracts shall be the 2014 contract and the 2018 contract respectively.

40. The 2014 contract was entered into and signed by the Complainant's guardian of ID no. 103XXXXX4 and the 2018 contract was also signed by the Complainant's guardian of the same ID no.

Therefore, the Complainant's failed to establish how the 2018 contract did not exist yet it was signed by the same guardian.

41. Further, the Complainant relied on the contract dated 24th October 2014 and denies the existence of the latter contract dated 8th August 2018. In her rejoinder, the Complainant directed this Office to clause 8 of this contract on the duration on the use of the Complainant's image. Notably, this clause states that *"The Player and Parent/Guardian acknowledge that the player may be photographed or recorded while playing for the Academy. **The player grants the Academy a non-exclusive perpetual license to use his/her image, voice, likeness or any other indica or forms of his identity in any form or medium without any compensation to the player.**"*

A perpetual license never expires. This means that even if the 2014 contract was still in force, the Complainant had granted the Respondent perpetual license to use her image.

42. The Respondent pointed out Clause 13.1 of the 2018 contract which stated that *"This contract and the documents referred to herein constitute the entire agreement between the Club and the Player and **supersede any and all preceding agreements between the Club and the Player.**"*

The 2018 contract therefore superseded the 2014 contract based on the above clause. No evidence was adduced by the Complainant that invalidates the 2018 contract.

43. Clause 4.2 of the 2018 contract stated that *"the player grants the Club the right to photograph the Player...and PROVIDED that all rights shall cease on termination of this contract **save for the use and/or sale of any promotional materials...as shall then already be manufactured or in the process of manufacture or required to satisfy any outstanding orders.**"*

44. The above clause settles the dispute in this complaint. The image was a banner that had already been manufactured as at the time and thus the right to use the Complainant's image did not cease upon termination of the 2018 Contract.

The Complainant consented to the use of her image as per Clause 4.2 of the 2018 contract.

45. Therefore, while there was continuous use of the Complainant's image, the Respondent was within its contractual boundaries to continue to use the image as it had obtained consent from the Complainant's guardian to do so.

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

46. 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.

47. The Complainant sought compensation from the Respondent for allegedly continuous use of her image without her consent and for alleged commercial purpose.

48. This Office having found that the Respondent's continuous use of the Complainant's image was pursuant to a contract between the parties, the remedy for compensation is therefore denied and the complaint is dismissed pursuant to Regulation 14 (3) (c) of the Enforcement Regulations.

H. FINAL DETERMINATION

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

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

DATED at **NAIROBI** this 13th day of February 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

