



**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 2443 OF 2023**

RHONE OTIENO.....COMPLAINANT

-VERSUS-

1824 WHISKEY BAR & LOUNGE.....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 23rd November 2023 alleging that the Respondent used his image for marketing and commercial purposes on a TikTok page allegedly run and operated by the Respondent.

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 23rd 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 20th December 2023 referenced ODPC/CONF/1/5 VOL 1 (651). 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 legal basis relied upon to process the Complainant's image and whether and how they fulfilled the duty to notify data subjects prior to collection of their personal data pursuant to Section 29 of the Act;
 - d. Whether the Complainant consented to the processing of his personal data; and



- e. 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 2nd February 2024.
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 his complaint through his 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 illegally and unlawfully posted a video containing his image on their Tiktok page. The Complainant stated that the information was posted without his consent.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

12. The Complainant stated that the Respondent posted a video containing his image on their Tiktok page without his consent or authority and with intent to illegally and unlawfully commercialize and market its club and increase enrollments thereto.
13. The Complainant indicated that the unlawful use of his image for commercial purposes by the Respondent with intent to market its brand without his consent was in violation of his intellectual property rights, right to privacy under Article 31 of the Constitution of Kenya 2010, right to human dignity under Article 28 of the Constitution, sections 33(3) and 35 of the Copyright Act and Sections 26, 30 and 37 of the Data Protection Act 2019.

The Complainant attached a screenshot of his image allegedly posted on the Respondent's TikTok account. He also provided a screenshot of various comments which the post attracted and the video allegedly containing his image.

14. The Complainant stated that the Respondent's actions continued to breach his constitutional and privacy rights and that his image was still up on the Respondent's public Tiktok page hence the continued capitalization of the same without his consent.

15. The Complainant stated that he wanted the Respondent to admit liability of infringement of his privacy, constitutional and intellectual property rights and he also wanted the Respondent to compensate him for infringing on his rights.

ii. THE RESPONDENT'S RESPONSE

16. The Respondent stated it does not have and has never registered a TikTok account or page. They stated that they only run verified social media accounts and the purported video posted on a TikTok account referred by the Complainant was not posted by them.

17. The Respondent stated that the said TikTok account is not a verified account and because they are a dominant organization in the entertainment industry, every person wants to be associated with them considering that they cannot and are not able to regulate opening of social media accounts, they opined to the possibility of a parody account.

18. The Respondent therefore dissociated itself with the referred TikTok account referred in the complaint because they allegedly did not run or operate any TikTok account.

19. The Respondent contended that it was a possible collusion by the Complainant and a third party to illegally enrich themselves by opening a TikTok account in their name to force a compensation.

F. INVESTIGATIONS UNDERTAKEN

20. 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.
21. This Office sought a response from the Complainant regarding the Respondent's dissociation with the TikTok page.
22. The Complainant stated that the page featured a substantial number of videos related to the Respondent's events and activities. He stated that his video was just one among many and was not posted upon the page's creation but was amidst numerous other videos.
- The Complainant availed a screenshot of the said page which displayed some videos posted.
23. Further, the Complainant stated that the page boasts of over 134.2K followers and 1.6M likes indicating its significant reach and potential benefit to the Respondent. Therefore, the Respondent should not deny association with the page nor alluding collusion with a third party neither mentioned nor identified for purposes of clarification.
24. The Complainant also indicated that despite the Respondent's claim of being unaware of the page, no complaints regarding the illegal use of its name on TikTok had been made public. There was no record of such complaints prior to or after his video was posted, nor even after filing of the complaint.
25. On the verification of the page, the Complainant stated that there were numerous legitimate but unverified TikTok accounts. Therefore, the lack of verification of the page should not be a defence for the unauthorised posting of the video.
26. Investigations conducted by this Office indicated that the videos and photos containing the Complainant's image were deleted from the TikTok page allegedly run by the Respondent.

G. ISSUES FOR DETERMINATION

27. It is imperative to note that in this analysis, this Office is confined to issues pertaining to the rights of the Complainant under the Data Protection Act. The Complainant alleged several infringements including those of intellectual property. This Office has jurisdiction to only deal with data subjects' rights under the Act.

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

- i. Whether there was an infringement of the Complainant's rights under the Act; and
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THERE WAS AN INFRINGEMENT OF THE COMPLAINANT'S RIGHTS UNDER THE ACT

29. The Complainant is a data subject as per the definition under the Act and has rights as stipulated under the Act. Specifically, under Section 26 (c) and (d) the Complainant had the right to object to the processing of all or part of his personal data and to deletion of false or misleading data about him.

30. Rightfully so, the Complainant exercised this right and wrote a demand letter to the Respondent demanding they pull down the video that contained the Complainant's image.

31. As at the time of lodging this complaint, investigations conducted by this Office revealed that the video containing the Complainant's image had been pulled down from the TikTok page that the Complainant alleged belonged to and was being operated by the Respondent.

32. Upon analysis of the parties' submissions, the Complainant did not conclusively provide evidence that the TikTok page belonged to and was being operated by the Respondent.

33. Therefore, this Office finds that, due to the deletion of the video containing the Complainant's image by whoever run the TikTok page, his right to objection and deletion were upheld and there was no infringement of his rights.

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

34. 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.

35. The Complainant sought compensation from the Respondent for allegedly posting a video containing the Complainant's image on a page he claimed belonged to the Respondent. The Complainant could not conclusively prove that the page was being run by the Respondent and further, the video was pulled down from the said page. Therefore, this Office declines to make an order for compensation.

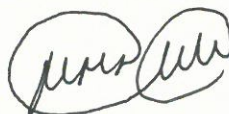
36. However, the Respondent is directed that this Office can conduct periodic inspection and compliance audits to ascertain compliance with the Act with regards to protecting the privacy of its customers. Further, the Respondent is directed to ensure it always seeks express consent from their clients before posting on any of their social media pages failure to which, the Data Commissioner shall impose administrative fines as provided for under the Act.

H. FINAL DETERMINATION

37. 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 20th day of February 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

