



**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 2396 OF 2023**

ROBINAH NYAMBUSI.....COMPLAINANT

-VERSUS-

PLATINUM CREDIT LIMITED.....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 19th November 2023 alleging that the Respondent was using her image to market its products in a campaign without her 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 19th 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 (613). 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 it by the Complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. The lawful basis relied upon to use the Complainant's image in a marketing campaign;
 - d. The contractual agreement with the Complainant, if any; 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 Respondent responded to the allegations *vide* a letter dated 19th 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 stated that the Respondent used her image to market its products in a campaign dubbed 'Sukuma Wiki February 2023' without her consent. She stated that it was a breach of her privacy as her photo has been all over the intranet.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

11. The Complainant attached a flyer that she alleged contained her image. She provided a recent photo of herself as proof that she was the one posted on the Respondent's flyer.
12. The Complainant stated that she was an employee of the Respondent and left in October 2022 yet her image was used for the campaign in March 2023.
13. The Complainant requested for compensation and that her photo be pulled down from the Respondent's database.

ii. THE RESPONDENT'S RESPONSE

14. The Respondent stated that the Complainant was their former sales officer who exited the company in October 2022. They provided her employment contract and evidence of deactivation of the sales officer as proof of the same.

15. The Respondent confirmed that the Complainant's image was taken during the course of her employment and thereafter, inadvertently used in their internal communication to their sales officers. The Respondent stated that the image has never been used for marketing and/or commercial purposes and they have not derived any commercial value from the intranet communication.

16. The Respondent indicated that they have permanently deleted her image from its database and in compliance with the Act, they have put in place a Media Consent & Release Form to be executed by staff. The form allows staff to give and/or withdraw consent. They provided the form as proof of the same.

F. ISSUES FOR DETERMINATION

17. Having considered the nature of the complaint and the evidence adduced by the parties to this complaint, it is not in dispute that the Respondent used the Complainant's image in its internal marketing campaign flyer.

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

- i. Whether prior consent was obtained by the Respondent before using the Complainant's image; and
- ii. Whether the Complainant's rights was infringed;
- iii. Whether the Complainant is entitled to the remedy sought for the alleged infringement of her privacy rights.

I. WHETHER PRIOR CONSENT WAS OBTAINED BY THE RESPONDENT BEFORE USING THE COMPLAINANT'S IMAGE

19. Section 2 of the Act defines consent as *any manifestation of express, unequivocal, free, specific and informed indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data relating to the data subject.*

20. Section 32(1) of the Act states that *the data controller or data processor shall bear the burden of proof for establishing the data subject's consent to the processing of their personal data for a specified purpose.*
21. The Complainant alleged that her consent was never sought before the Respondent used her image in the flyer.
22. The Complainant was an employee of the Respondent when her photo was allegedly taken for the marketing campaign.
23. The Respondent on the other hand stated as follows:
"Her image was taken during the course of her employment and thereafter, inadvertently, used in our internal communication to our sales officers."
From the above assertions it is evident that the Respondent did not seek the Complainant's express consent when it had the intent of using the Complainant's image for commercial purposes.
24. Moreover, from the Complainant's contract dated 20th May 2022, there is no clause that permits the use of the complainant's image during the course of her employment commercially.
25. Additionally, the Respondent's demonstrated that the said image used in the campaign was shared internally and was yet to be circulated for the marketing purposes. The email was circulated through intranet@platinumcredit.co.ke and usdd@platinumcredit.co.ke.
26. Section 37(1) of the Act provides that a person shall not use, for commercial purposes personal data unless the person has sought and obtained express consent from a data subject. In this regard, the burden is on the data controller to prove that they obtained **express** consent.
27. In the instant case, the Respondent admits that they inadvertently used the said image for internal communication to their sales officers. The main issue here, however, is that they did not obtain express consent from the complainant for their intended marketing campaign.



28. This Office however, takes cognizance of the fact that from the Complainant's evidence, the intended marketing campaign was only shared internally as demonstrated by the two email addresses it was shared to that is emails intranet@platinumcredit.co.ke and ussd@platinumcredit.co.ke. The Complainant in this regard has therefore failed to demonstrate that the said marketing campaign posters were shared externally thereby meeting the commercial purposes threshold.
29. The Respondent therefore as a result, permanently deleted the Complainant's image from their database and subsequently put in place a Media Consent & Release Form to be executed by all staff going forward to prevent such occurrences.
30. This Office therefore finds that despite the fact that prior informed consent was not obtained from the Complainant to use her image in their flyers, the Respondent took action by permanently deleting her image from their database. Similarly, from the Complainant's evidence it has been proven that the said marketing flyer was shared internally as opposed to being used commercially.

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

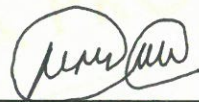
31. The Complainant prayed for compensation and that the Respondent takes down her photo. The Respondent already took down her the said photo.
32. With regards to the prayer for compensation, the Complainant failed to prove that the Respondent used the flyer for marketing and commercial purposes.
33. Pursuant to Regulation 14 (2) (e), this Office directs the Respondent to have all its current employees sign the Media Consent & Release Form to ensure that such occurrences of this nature do not occur again.

G. FINAL DETERMINATION

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

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

DATED at **NAIROBI** this 16th day of February 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

