



## OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 2533 OF 2023

TERRENCE ADRIANO.....COMPLAINANT

-VERSUS-

SWARA ACACIA LODGE LIMITED.....RESPONDENT

### DETERMINATION

*(Pursuant to Section 8 (1) (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 Complainant filed a complaint on 7<sup>th</sup> December 2023 alleging that the Respondent used his image for commercial purposes on its social media page 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 as '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 (1) (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 (hereinafter as '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 7<sup>th</sup> December, 2023. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by the Complainant, who was an 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 8<sup>th</sup> January 2024 and referenced ODPC/CONF/1/5 VOL 1(707). 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 allegations made against it by the Complainant;
  - b. Any relevant materials or evidence in support of the response;
  - c. The legal basis relied upon to store, process and engage with the Complainant's personal data and whether or how it fulfilled the duty to notify data subjects prior to collection of their personal data pursuant to Section 29 of the Act;



- d. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint does not take place again; and
  - e. Details of how it fulfills the data subject's right of erasure as provided for in Section 40(1)(b) of the Act.
8. The Respondents responded to the Notification of Complaint letter *vide* a letter dated 18<sup>th</sup> January, 2024.
9. This determination is therefore as a result of analysis of the complaint as received, the response by the Respondent and investigations conducted by the Office.

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

10. The Complainant alleged that the Respondent used his images for advertising on its social media page without his consent.
11. The Complainant provided screenshots of the subject images allegedly posted on the Respondent's Facebook page and screenshots of his WhatsApp conversations with the Respondent, where he had requested the Respondent to pull down the subject images from its page.

#### **E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED**

##### **i. THE COMPLAINANT'S CASE**

12. The Complainant stated that the Respondent posted his images (photographs) on its social media page (Facebook) without his consent and that his images continue to be used to create promotional materials for the Respondent, which is creating a misleading impression of his current involvement with the Respondent. He provided screenshots of the subject images as proof of the allegations made.
13. The Complainant indicated that the unauthorized use of his images, for commercial purposes, by the Respondent with intent to market its brand was in violation of his right to privacy.

14. The Complainant further stated that he played a pivotal role in representing the Respondent's brand and establishing a strong connection with their valued clients. His image was associated with the hotel's marketing efforts while he was employed by the Respondent.
15. The Complainant stated that his images continue to be used despite him having left employment with the Respondent which creates a misleading impression of his current involvement with the Respondent.
16. He further states that clients who were familiar with his association with the Respondent are questioning his integrity and commitment as they perceive the continued use of his image as an endorsement of a connection that no longer exists.
17. Additionally, the Complainant states that the unauthorized use of his images has not only damaged his professional reputation but has also taken a toll on his self-esteem and dignity, and is eroding the trust that his clients had in his capabilities.
18. The Complainant provided screenshots of his WhatsApp conversations with the Respondent requesting them to pull down his images.
19. Finally, the Complainant stated that he wanted the Respondent to pull down his images from the Respondent's social media page and to be compensated for the infringement on his privacy and the unauthorized commercial use of his images.

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

20. The Respondent in its response stated that the Complainant was its former employee and was engaged as a Sales Executive on or around the 1<sup>st</sup> day of May 2021. The Respondent attached a copy of the Complainant's letter of temporary employment as proof.
21. The Respondent stated that sometime in the year 2021, the Complainant was asked if he would like to participate in his pictures being taken and uploaded in the Respondent's Facebook page.

22. The Respondent further stated that the request to take pictures was readily and willingly accepted with the Complainant pausing comfortably for the pictures to be taken as is depicted in one of the pictures where he is on a chair enjoying an afternoon drink.
23. The Respondent stated that the pictures taken were uploaded onto the Respondent's Facebook page and since then numerous pictures have been uploaded onto the Respondent's Facebook page with the said picture identified by the Complainant having to be literally fished out of the series of posts.
24. The Respondent stated that the complaint is maliciously filed as the Complainant had not in any way whatsoever communicated to the Respondent his desire for the said pictures to be taken down from its website prior to the filing of the complaint.
25. Further, the Respondent stated that if the Complainant had communicated his wish to have said pictures removed as provided for under Section 40(1) of the Act, then the Respondent would have removed the said pictures as they were merely incidental to the marketing done on the Respondent's Facebook page.
26. The Respondent stated that there has been no gain made from the said pictures and invited the Complainant to prove any contrary assertions.
27. The Respondent stated that the Complainant made grave assertions by stating that "the unauthorized use of my image has not only damaged my professional reputation but has also taken a toll on my self-esteem and dignity" of which the Respondent reiterates that at the time the photo was taken the Complainant, in his capacity of Sales Representative, voluntarily agreed to his photo being taken and used as has been admitted albeit in a skewed version of occurrence that "I played a pivotal role in representing the brand and establishing a strong connection with our valued clients".
28. In addition, the Respondent noted that the purported WhatsApp communication attached to the complaint, allegedly sent to the Respondent before filing of the complaint on 7<sup>th</sup> December 2023 by the Complainant, was sent to the Respondent on 17<sup>th</sup> December 2023 which is 10 days after filing the

present complaint, making it impossible for the Respondent to know the intentions of the Complainant to have the pictures taken down. The Respondent provided a screenshot of a WhatsApp message dated 17<sup>th</sup> December, 2023 as proof.

29. The Respondent stated that the Complainant has failed to adduce any evidence of refusal to take down the photos once notified, has failed to prove any financial gain or purported loss of dignity and mental anguish following the publication of his photo and as such none of the assertions made are true.

30. The Respondent stated that upon receiving the notification of complaint, it immediately removed pictures associated with the Complainant from its Facebook page and that it is undertaking an audit of all the historical photos on its website to delete all photos associated with the Complainant.

31. In addition, the Respondent stated that it intends to send a request of deletion of any archived images of the Complainant to Meta (Facebook) to delete the same from their Facebook page.

32. The Respondent urged this Office to dismiss the Complaint for being an abuse of the powers of the Office in order for the Complainant to achieve personally orchestrated objectives of unjust enrichment to the detriment of the Respondent.

#### **F. INVESTIGATIONS UNDERTAKEN**

33. The Office visited the Respondent's Facebook page by the name 'Swara Acacia Lodge' which has 16,000 followers.

34. As at the time of lodging this complaint, investigations conducted by this Office revealed that the Complainant's images were available and accessible at the Respondent's Facebook page.

35. Investigations conducted after the notification of complaint letter was sent to the Respondent revealed that the Respondent had pulled down the images of the Complainant from its Facebook page, save for one image which is still available and accessible on the Respondent's Facebook page as at the date of this determination.

## **G. ISSUES FOR DETERMINATION**

36. 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;
- ii. Whether the Respondent fulfilled its 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 AN INFRINGEMENT OF THE COMPLAINANT'S RIGHTS UNDER THE ACT**

37. Section 26 (c) of the Act provides for the right to object to processing of personal data. The Complainant had the right to object to the processing of all or part of his personal data.

38. Section 40(1)(b) of the Act provides for the right of erasure and states that, "a data subject may request a data controller or data processor to erase or destroy without undue delay personal data that the data controller or data processor is no longer authorized to retain, irrelevant, excessive or obtained unlawfully.

39. In addition, Regulation 12(1)(b) of the Data Protection (General) Regulations, 2021 provides that a data subject may request a data controller or data processor to erase or destroy personal data held by the data controller or data processor where the data subject withdraws their consent that was the lawful basis for retaining the personal data.

40. The Complainant exercised the above rights by writing a WhatsApp message to the Respondent demanding it to stop using his images for commercial purposes and to pull down the subject images from its Facebook page.

41. The Complainant requested the Respondent to pull down the images on or about 17<sup>th</sup> December, 2023. The Office Notified the Respondent of the complaint on 8<sup>th</sup> January, 2024. It was until this Office notified the Respondent of the Complaint that they acted upon the Complainant's request to pull down some of his images. It is worth pointing out that the Respondent did not pull

down all the images and one of the Complainant's image is still published on the Respondent's Facebook page as of the date of this determination.

42. The Respondent did not prove that it had any overriding legitimate interest to continue having the Complainant's image on its Facebook page since he objected to the publication of his image and withdrew his consent.

43. From the foregoing, this Office finds that the Complainant's right to object to the processing of his personal data and his right of erasure of his personal data were violated by the Respondent.

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

44. The Respondent is a data controller within the definition of the Act and therefore has obligations pursuant to the Act.

45. 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).

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

47. The Respondent discharged the burden of proof in establishing that the Complainant indeed consented to having his photos taken and published on the its Facebook page. However, the Complainant withdrew his consent when he requested the Respondent to pull down his images from its Facebook page. The Complainant exercised his right of erasure which the Respondent failed to uphold by not erasing all the images of the Complainant uploaded on its Facebook page.

48. From the foregoing, this Office finds that the Respondent failed to fulfil its obligations under the Act by not erasing all of the Complainant's images when he withdrew his consent.

### **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 for the immediate removal of his images from the Respondent's Facebook page. His images were removed save for one, which is still published on the Respondent's page. The Respondent is hereby **ordered to erase the Complainant's image(s) from its Facebook page within the next seven (7) days failure to which an enforcement notice shall issue.**

51. The Complainant also prayed for compensation from the Respondent for infringement on his privacy and for the unauthorized commercial use of his image. The Complainant further prayed for reimbursement of legal fees incurred in addressing this matter.

52. Section 65 of the Act provides for compensation to data subjects and states, "*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.*"

53. Section 65(4) of the Act states that, "*damage includes financial loss and damage not involving financial loss, including distress.*"

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

55. The Respondent is liable for violating the Complainant's right of erasure and is hereby **ordered to pay the Complainant Kenya Shillings two hundred and fifty thousand (Kshs. 250,000) as compensation.**

56. The prayer for reimbursement of legal fees incurred by the Complainant is denied as no evidence was adduced indicating that the Complainant incurred such expenses in pursuing this matter.

57. Pursuant to Regulation 14(2)(e), this Office directs the Respondent to put in place clear consent mechanisms and seek prior consent before publishing a data subject's image on its social media page(s). The consent mechanism should also provide for withdrawal of consent and should be acted upon within the timelines stipulated under the Act and the Data Protection (General) Regulations, 2021.

#### **H. FINAL DETERMINATION**

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

- i. The Respondent is found liable for violating the Complainant's right of erasure;
- ii. The Respondent is hereby ordered **to erase the Complainant's image from its Facebook page within the next seven (7) days**, failure to which an enforcement notice shall issue;
- iii. The Respondent is hereby ordered **to compensate the Complainant Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000).**
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

**DATED** at **NAIROBI** this 5<sup>th</sup> day of March 2024.



---

**IMMACULATE KASSAIT, MBS**  
**DATA COMMISSIONER**