



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0018 OF 2024

JEREMIAH OKELLO.....COMPLAINANT

-VERSUS-

ZEROX TECHNOLOGY 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 lodged a complaint against the Respondent and its product Asapkash alleging the Respondent’s agents had been calling him incessantly for a loan that he was not a party to.

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 (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 (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 3rd January 2024. 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 23rd January 2024 referenced ODPC/CONF/1/5 VOL 1 (737). 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. Details of how they obtained the Complainant's personal details;
 - d. The legal basis relied upon to engage with the Complainant's and whether or how they fulfilled the duty to notify under Section 29 of the Act;

- e. Whether the Complainant consented to the processing of their personal data; and
 - f. 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 do not take again.
8. The Respondents responded to the allegations *vide* letter dated 13th February 2024 and emails dated 21st and 25th March, 2024.

D. NATURE OF THE COMPLAINT

9. The Complainant alleged that the Respondent had been calling him incessantly for a loan that he was not party to. He alleged that the Respondent called him over 83 times within a span of 20 minutes.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

10. The Complainant provided screenshots of several numbers that he alleged belonged to agents of the Respondent.

ii. THE RESPONDENT'S RESPONSE

11. The Respondent filed an initial response to the notification of complaint, received on 16th February 2024, and stated that the Complainant was not their customer in any of their digital credit applications and that he did not consent to be listed as a guarantor to any of their customers.
12. The Respondent stated that they had no record of having reached out to the complainant, either through its internal staff or any of its contracted third-party service providers.
13. The Respondent denied that the numbers captured on the screenshots provided by the Complainant belonged to them.
14. In a further response dated 21st March 2024, the Respondent confirmed that the Complainant was indeed listed as an emergency contact to the borrower.
15. The Respondent averred that their protocols necessitate explicit consent from listed emergency contacts to be verified through the transmission of a one-

time-password (OTP) to their registered phone number, thereby confirming their consent to be listed as emergency contacts.

16. The Respondent alleged that the Complainant provided his consent to be listed as an emergency contact for the borrower thereby agreeing to assist in their loan recovery procedures.

17. The Respondent stated that the borrower had not removed the Complainant as his emergency contact and therefore, the Complainant's consent to assist in loan recovery procedures was still valid.

F. INVESTIGATIONS UNDERTAKEN

18. Owing to the Respondent's first response, it was necessary to conduct further investigations to this complaint prompting an on-site visit to the Respondent's premises on 20th March 2023.

19. During the visit, investigators conducted a sample spot check on the numbers provided by the Complainant and established that some of the numbers that called the Complainant belonged to the Respondent. This was done by directing several agents to make a call to a phone number belonging to this Office. It was established that indeed several numbers, being, 02079 02079 07110 and 07110{ }, belonged to the Respondent.

20. The Respondent was then directed by this Office to provide a subsequent response in light of the new findings prompting their second response dated 21st March 2024.

21. Further to their second response, the Office directed the Respondent to provide proof that the Complainant received the pop-up message/OTP to demonstrate that he consented to being listed as an emergency contact by the borrower and proof that the Complainant explicitly consented to be added as an emergency contact of the borrower prior to the disbursement of the loan.

22. In an email dated 25th March, 2024, the Respondent stated that once the OTP link is dispatched to the particular emergency contact, the system does not retain a digital footprint of the said transmission.

23. The Respondent also indicated that the provision of an emergency contact information occurs at the time of a client's registration into the system and not at the time of disbursing the loan.
24. From the site investigations conducted by this Office, it was established that the Complainant was listed as an emergency contact to a certain borrower and that the Respondent used a system known as a SIP trunk solution procured from certain vendors to communicate with their customers and emergency contacts.
25. It was also established that numbers provided by the Complainant with the prefix +254711082XXX belonged to the Respondent, contrary to their averments in their initial response, thereby providing false information to this Office.
26. Investigations also established that despite the Complainant being listed as an emergency contact to the borrower, there was no evidence provided to this Office that the Complainant received the alleged pop-up message or OTP to prompt him to consent to the listing as an emergency contact.

G. ISSUES FOR DETERMINATION

27. In light of the above, the complaint, the Respondent's responses and evidence adduced together with the investigations conducted, 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

28. 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 (a) the

Complainant had the right to be informed of the use to which his personal data was to be put, in this case, the listing of his phone number as an emergency contact of a person who borrowed a loan from the Respondent.

29. From the Respondent's response, the evidence adduced and investigations conducted by this Office, the Complainant was not informed that his number was listed as an emergency contact by a borrower.

30. Therefore, this Office finds that the Complainant's right under Section 26 (a) and was infringed by the Respondent.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

31. The Respondent is a data controller as per the definitions of the Act and is therefore mandated to fulfil its obligations as such under the Act.

32. Section 28 (1) provides that a data controller shall collect personal data **directly** from the data subject. Section 28 (2) gives instances where a data controller can collect personal data indirectly. However, the Respondent did not prove that it had any basis for indirect collection of the Complainant's personal data, specifically under Section 28 (2) (c) where a data controller can collect personal data indirectly where the data subject has consented to the collection from another source.

33. The Respondent stated that the borrower listed the Complainant as his emergency contact thereby they had explicit consent from the Complainant to be listed as an emergency contact. This assertion is contrary from the provisions of Section 28 where a data controller is obligated to collect personal data only **directly** from the data subject unless the instances under Section 28 (2) are proven. In this case, they were not.

34. Section 29 of the Act mandates a data controller or data processor to, before collecting personal data, inform the data subject of, *inter alia*, his rights under Section 26 of the Act, the fact that personal data is being collected and the purpose for collection of the personal data.

35. The Respondent confirmed through their response that the provision of emergency contact information occurs at the onset of their client's registration into the system. This means that a third party provides a certain number as an emergency contact when registering into the Respondent's system for purposes of getting a loan.

The Respondent, as a data controller should then notify the person being listed as an emergency contact that they have collected their number from a person intending to borrow a loan from them, inform him or her of their rights under the Act and the purpose for collection. This was not the case and therefore the Respondent was in violation of their duty under Section 29 of the Act.

36. Section 30 of the Act provides for the lawful basis of processing personal data and states that a data controller or data processor **shall not** process personal data, **unless** the data subject consents to the processing for one or more specified purposes or the processing is necessary for the purposes listed in subsection 1 (b). The Respondent failed to establish that they had consent to process the Complainant's personal data.

37. Further, Section 32 of the Act states that a data controller or data processor shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose. The Respondent's responses failed to discharge this burden as they did not prove that there was express consent from the Complainant in listing him as an emergency contact.

38. The Respondent also failed to provide proof of the pop-up message or OTP allegedly sent to the Complainant thereby failing to discharge the burden laid upon them pursuant to Section 32 of the Act.

39. In light of the above, this Office finds that the Respondent did not fulfil its obligations under the Act.

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

40. 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.

41. Section 65 of the Act provides 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. The Section indicates that damage included financial loss and damage not involving financial loss including distress.

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

42. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's rights under Section 26 (a) were infringed upon by the Respondent. The Respondent failed to inform the Complainant the use of his personal data, and had him listed as an emergency contact without his express consent. In addition, the investigations conducted by this Office demonstrated that the Respondents provided false information to this Office.

43. In this context, the Respondent is hereby ordered to pay the Complainant **Kenya Shillings Three Hundred Thousand (Kshs. 300,000)** for the infringement of his rights under the Act.

44. The Respondent is also in violation of several obligations under the Act as analyzed above and therefore, pursuant to Section 58 of the Act, an Enforcement Notice shall be issued against the Respondent.

H. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for infringement of the Complainant's rights and non-compliance of its obligations under the Act;

- ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Three Hundred Thousand (Kshs. 300,000)** as compensation;
- iii. An Enforcement Notice to issue against the Respondent; and
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 15th day of April 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER



