



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 0627 OF 2024**

**ELIJAH KARIUKI MBUTHIA .....COMPLAINANT**

**-VERSUS-**

**ST. JOSEPH HEALTH CENTRE.....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 complaint concerns the allegation that the Respondent used the Complainant's image on a public signpost and various print media including but not limited to calendars and a local hospital publication for commercial gain without express 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

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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 15<sup>th</sup> May 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 17<sup>th</sup> May, 2024 referenced ODPC/CONF/1/5 VOL 1 (969). 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, among other things, the Respondent was asked to provide this Office with the following:
  - a) A response to the allegations made against them by the Complainant;
  - b) Any relevant materials or evidence in support of their response;
  - c) The lawful basis relied upon to process the Complainant's personal data;
  - d) Evidence as to whether the Complainant consented to the processing of their personal data for promotional purposes; and
  - e) A detailed description of whether it fulfills the duty to notify under Section 29 of the Act and how the same is fulfilled.

8. The Respondent responded to the allegations made against it *vide* a letter dated 10<sup>th</sup> June, 2024.

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

9. The Complainant alleged that the Respondent processed his image without his consent for marketing and commercial purposes.

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

##### **i. THE COMPLAINANTS' CASE**

10. The Complainant, a Clinical Officer and former employee of the Respondent, stated that while he was still employed by the Respondent and in the course of conducting ordinary business, the Respondent arranged for his photo to be taken, informing him that it would be used solely for staff identification cards.
11. The Complainant further stated that the photos were never used on staff identification cards, as the cards were never distributed to the employees. Instead, the photos were later used and continued to be used on various promotional materials, including a physical public signpost, a local publication called "The Dream," and wall calendars, among other materials. These items allegedly remained in circulation and use for more than a year after he had ceased to be an employee of the Respondent.
12. The Complainant alleged that he objected to the use of his image and likeness for advertising and marketing purposes without his express consent. He subsequently raised an issue on the infringement of his privacy and demanded compensation from the Respondent, but the Respondent refused to acknowledge any wrongdoing.
13. The Complainant argued that there was a misrepresentation of facts during the collection of data; specifically, he was asked to take a picture for use in staff identification cards, but the same photograph was used for marketing and promotional purposes without his knowledge. The lack of direct consent for this additional use constituted a breach of privacy and an unauthorized commercial exploitation of his likeness, which had caused him emotional distress.

14. The Complainant states that prior to filing a complaint with the Office, he sought for legal aid from *Kituo Cha Sheria* who furnished the Respondent with a demand letter dated 4<sup>th</sup> June 2024 to cease and desist unauthorized commercial use of his image and likeness.
15. The Complainant further avers that the violation in question pertains to the unauthorized processing of his image for commercial gain without his express consent. Thus, the Respondent's response being dissatisfactory, a complaint was subsequently filed with the Office.
16. As evidence, the Complainant adduced the following: -
- i. A photograph of the 2022 Calendar procured by the Respondent with a display picture of the Complainant on the month of April.
  - ii. A picture showing a published segment displaying the Complainant's image and likeness where the Respondent breaks down the services it offers.
  - iii. A schedule of the Respondent's Management Committee meeting minutes dated 11<sup>th</sup> January 2023 where the Respondent actions for all signposts with staff images be brought down where consent was not given.

**ii. THE RESPONDENT'S RESPONSE**

17. The Respondent maintained that it used the Complainant's image with his express consent.
18. The Respondent further stated that the Complainant orally consented to be photographed to have his image on the Respondent's public sign post, local publication, calendar amongst others. The publication of his image on the Respondent's was done in good faith and was not an invasion of privacy.
19. The Respondent claimed that they had obtained the necessary consent verbally during a staff meeting and included the meeting minutes as evidence in its response.
20. The Respondent stated that if the Complainant elicited any objection to his photo being taken in the said circumstances, nothing would have stopped the management from electing another employee to stand in his position.

21. The Respondent further contended that at no point, in the course of the Complainant's employment with the Respondent did the Complainant raise any concerns regarding the use of his image on its website and that by the Complainant complaining after the termination of employment is an afterthought and an opportunistic manoeuvre on the part of the Complainant to extort money from the Respondent.
22. The Respondent also stated that the use of public signposts, the local publication, calendars, and other materials was intended for awareness purposes and not for commercial gain.
23. The Respondent acknowledged that it did not have written consent from the employees when collecting and processing this data for the awareness program. However, the Respondent argued that the Complainant's active and voluntary participation in the photo session, with its purposes disclosed and understood by all participants, unequivocally implied his consent.
24. The Respondent also pleaded that at any point before and after the photo session, the Complainant had the option of objecting to the use of his image but he failed to do so.
25. In its response, the Respondent stated that the public signpost remained in use until July 2023, when it was taken down. Additionally, the Respondent provided the Office with written and signed witness statements from other employees and former employees who participated in the project alongside the Complainant. These statements demonstrated that, despite consent being sought verbally, all participants were duly informed of the purpose and use of their images and likeness. The Respondent only proceeded with processing this data after receiving verbal consent from all involved.
26. The Respondent claimed that the Complainant's complaint was not made in good faith and was intended to damage the hospital's reputation for his personal gain. The Respondent further stated that the Complainant had not demonstrated any commercial benefit derived from the use of his image and that allegations of damage suffered were not substantiated. Therefore, the Respondent argued that the Complainant's request for compensation was unfounded.

27. The Respondent pleaded that the Complainant's active and voluntary participation in the photo session whose purposes were disclosed and understood by all the participants, and the executed model release forms unequivocally gave express consent.

28. As evidence, the Respondent adduced the following: -

- i. The Management Team meeting minutes dated 19<sup>th</sup> January 2021
- ii. Signed Written witness statements from all other employees and/or participants of the awareness project excluding the Complainant
- iii. Copies of the demand letters received from the Complainant.
- iv. Copy of the pulled down signage

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

29. In exercising its investigative mandate as provided for in the Act, this Office conducted internal investigations on all documentation submitted.

30. During the investigation, it was found that the written, signed, and executed witness statements from the employees and former employees who participated in the project uniformly indicated that, although consent was sought verbally, the Respondent explicitly obtained consent from all parties before publishing their photos.

31. Additionally, it was revealed that among the eight witness statements received, seven explicitly stated that the Respondent sought consent for the use of their images and likeness for advertisement, marketing, and promotion of the Health Center. Only one witness statement indicated that consent was sought solely for creating awareness.

32. However, based on the evidence provided, the Respondent did not furnish the Office with evidence as to whether the written, signed, and executed witness statements were from actual employees and/or former employees of the Respondent who participated in the project alongside the Complainant as alleged. The Respondent did not provide sufficient evidence to demonstrate the employment status or involvement of these individuals.

## **G. ISSUES FOR DETERMINATION**

33. It is undisputed that the Respondent used the Complainant's image on its public sign post and various print media.

34. 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 the Respondent obtained the Complainant's consent as required by the Act to use his image for commercial purposes;
- ii. Whether there was a violation of the Complainant's rights under the Act; and
- iii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

### **I. WHETHER THE RESPONDENT OBTAINED THE COMPLAINANT'S CONSENT AS REQUIRED BY THE ACT TO USE HIS IMAGE FOR COMMERCIAL PURPOSES**

35. 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.

36. The definition of the Act details the minimum criteria of or for consent to be that it must be certain that the individual has consented, and what they have consented to. There must be a clear signal that they agree or have agreed to the processing. The unambiguity of the consent further links in with the requirement that consent must be verifiable to the extent that one must be able to demonstrate that the data subject consented to the processing.

37. From a combined reading of the above definitions, it is apparent that valid consent is a product of conscious decision-making and requires affirmative action. It should be demonstrable and capable of being proven.

38. Section 30 (1) (a) of the Act provides 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.

39. The Act goes further to state the conditions of consent. It states as follows concerning the conditions of consent:-

*32. Conditions of consent*

*(1) 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.*

*(2) Unless otherwise provided under this Act, a data subject shall have the right to withdraw consent at any time.*

*(3) the withdrawal of consent under sub-section(2) shall not affect the lawfulness of processing based on prior consent before its withdrawal.*

*(4) In determining whether consent was freely given, account shall be taken of whether, among others, the performance of a contract, including the provision of a service, is conditional on the consent of the processing of personal data that is not necessary for the performance of that contract. (emphasis ours)*

40. Section 37 (1) of the Act provides for commercial use of data and states, "a person shall not use, for commercial purposes, personal data obtained pursuant to the provisions of this Act unless the person has sought and obtained **express consent** from the data subject or is authorised to do so under any written law and the data subject has been informed of such use when collecting the data from the data subject."

41. Regulation 14 (1) of the Data Protection (General) Regulations 2021 further elaborates Section 37 of the Act as follows:-

*14. Interpretation of commercial purposes*

*(1) for the purposes of section 37 (1) of the Act, a data controller or processor shall be considered to use personal data for commercial purposes where personal data of a data subject is used to advance commercial or economic interests, including inducing another person to buy, rent, lease, join, subscribe*

to, provide or exchange products, property, information or services, or enabling or effecting, directly or indirectly, a commercial transaction.

42. It is undisputed that the Respondent used the Complainant's image on a public signpost and in various print media to advertise and market its services. Consequently, the Complainant's image was used to further the Respondent's commercial and economic interests. The use of the Complainant's image, visible to the general public visiting the Respondent's health facility, was intended to induce potential clients, whether directly or indirectly, to use the Respondent's services. This use of the Complainant's image for commercial purposes required explicit consent.
43. The Respondent argued that the Complainant's active and voluntary participation in the project, with the purposes clearly disclosed and understood by all participants, implied his consent. The Respondent maintained that the Complainant's behavior before, during, and after the project demonstrated that he willingly consented to both having his image taken and its subsequent use on the public signpost and in various print media for advertisement, marketing and promotional purposes.
44. The Respondent has not demonstrated that participation in marketing and promotions was part of the employer/employee contract. Therefore, the Respondent was required to obtain express consent from the Complainant before using his data for purposes beyond those originally stated at the time of collection.
45. It is trite that where consent has been obtained orally, the same must be reduced into writing or recorded electronically, with an obtainable script. That way, the consent can be proven by the Respondent as the burden of proof establishing a data subject's consent to the processing of their personal data for a specified purpose rests upon the data controller.
46. From the above, the Respondent's contentions fall short of what express consent entails as per the Act. In no circumstance is an implied consent inferred through actions as argued by the Respondent be deemed to be express, even if the said actions are apparent enough, to the Respondent.

47. That being said, it therefore follows that the Respondent has not discharged its burden of proof to demonstrate that the Complainant expressly consented to the use of his image for commercial purposes, as envisaged under Section 32 (1) and 37 of the Act.

48. This Office therefore finds that as far as issue no (i) is concerned, the Respondent did not obtain the requisite consent required by the Act to use the Complainant's image for commercial purposes.

## **II. WHETHER THERE WAS A VIOLATION OF THE COMPLAINANT'S RIGHTS UNDER THE ACT**

49. Section 40 of the Act also provides for the right of rectification and erasure and states that a data subject may request a data controller or 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.

50. Further to the above, Regulation 12 (3) of the General Regulations provides that a data controller or data processor shall respond to a request for erasure within fourteen days of the request.

51. The Complainant alleges that he raised an objection to the use of his image and likeness; however, the Respondent did not acknowledge his rights as a data subject or accept liability for the unauthorized use of his image for commercial purposes.

52. In its investigation, the Office established that the alleged violation has been stated by both parties to have occurred between January 2021 and July 2023. However, by the time the complaint was received, the print media was no longer in circulation, and the public signpost had already been taken down by the Respondent.

53. The Respondent to pull down the public signpost and halting the circulation of all print media featuring the Complainant's image suggests that the Respondent

respected the Complainant's right to object and ceased using his image for advertising, marketing, and promoting the Health Center.

54. Based on the above, this Office therefore finds and determines that as far as issue no (ii) is concerned, the Respondent did not violate the Complainant's rights as envisaged under the Act.

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

55. According 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.

56. Having considered the merits of the complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent processed the Complainant's image for commercial purposes without the requisite consent as stipulated under the Act, it therefore, follows that there has been a violation of the Act by the Respondent to that extent.

57. The Complainant sought various remedies, including an order prohibiting the Respondent from using his name and image in any form of media, as well as compensation.

58. The Respondent contended that the award of compensation ought not to be awarded as the offending image was pulled down from its website. The Respondent further contended that in as much as the Complainant's image was being used in the course of his employment, it never received any form of objection from the Complainant.

59. The Respondent further avers that the complaint against it has not been made in good faith, and the Complainant has not demonstrated commercial value gained as a result of using his image for advertisement, marketing and promotion of the Health Center.

60. Section 65 (1) of the Act provides for compensation to a data subject and states 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. Section 65 (4) of the Act states that "damage" includes financial loss and damage not involving financial loss, including distress.

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

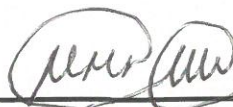
62. Having found that the Respondent did not obtain the requisite consent from the Complainant, and the Respondent collected and used the Complainant's image on a public signpost and various print media including but not limited to calendars the Respondent is hereby directed to compensate the Complainant the amount of Kshs. **500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only)** for the use of the Complainant's image for commercial purposes without express consent.

## I. FINAL DETERMINATION

63. In the ultimate, the Data Commissioner makes the following final determination;

- i. The Respondent is hereby found liable for the use of the Complainant's image for commercial purposes without express consent;
- ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Five Hundred Thousand (Kshs. 500,000)** as compensation; and
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 12<sup>th</sup> day of August 2024



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