



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. ...027.... OF 2024

ANNE NDUNG’U..... COMPLAINANT

-VERSUS-

ZAMARADI CAPITAL & CREDIT GROUP LTD T/A HAKI MONEY.....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 Complainant alleges that the Respondent has repeatedly contacted her to repay a loan taken by a third party, despite the fact that she was not the third party's guarantor at the time.

B. LEGAL BASIS

2. Article 31 (c) and (d) of the Constitution of Kenya 2010 provides for the right to privacy. Consequently, as an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter 'the Act') was enacted.
3. The Office of the Data Protection Commissioner (hereinafter 'this Office' 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

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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 of the Data Protection Commissioner (hereinafter '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.

C. BACKGROUND OF THE COMPLAINT

5. The Office received a complaint by Anne Ndung'u (hereinafter 'the Complainant') on 4th January 2024 pursuant to Section 56 of the Act and Regulation 4 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter the 'Enforcement Regulations') from the Complainant who is the aggrieved data subject.
6. The Respondent, Zamaradi Capital & Credit Group Limited, is a digital credit provider with a money lending product known as '**Haki Money**'.
7. Pursuant to Regulation 11 of the Enforcement Regulations, on 1st February 2024, the Office notified the Respondent of the complaint filed against it *vide* a letter dated 30th January 2024 referenced ODPC/CONF/1/5 VOL 1 (748). The Respondent was to provide its response to the complaint within 14 days from the date of receipt of the notification letter.
8. On 12th February 2024 the Respondent provided a response to the notification letter.
9. On 11th March 2024, this Office, in exercise of its investigative powers, conducted a site visit to the Respondent's premises.
10. This determination is therefore as a result of analysis of the complaint as received, the responses from the Respondent and investigations conducted by the Office.

C. NATURE OF THE COMPLAINT

I. COMPLAINANT'S CASE

11. In addition to the complaint, the Complainant provided screenshots and printouts of the message that she had received from the Respondent and/or its agents to support her complaint.

II. RESPONDENT'S RESPONSE

12. In its response, the Respondent stated that after receiving the notification of the complaint they reached out to the Complainant *via* email on 5th February 2024 in an attempt to establish further details and particulars surrounding her complaint and hopefully, amicably resolve the same.

13. The Respondent also avers that the Complainant responded that she needed a written apology as proof that her information was not in their system. To this the Respondent stated that it honoured her requests.

D. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

14. The Complainant, submitted her complaint *via* the Office's e-mail on 4th January 2024. As part of her evidence, she attached the message that was sent to her by Haki Money's employees and or agents which stated:

"DEAR GUARANTOR inform Walter XXXX of 0722XXXXX8 to clear his loan Kshs 28XXX(HAKI MONEY). The said person has become extremely non-cooperative. This might affect your credit score incase if they don't pay, kindly tell your friend to be a responsible borrower."

II. THE RESPONDENT'S EVIDENCE

15. The Respondent adduced as its evidence copies of e-mail threads between the Complainant and the Respondent. The emails involved the Respondent reaching out to the Complainant seeking to resolve the matter amicably.

16. The Respondent also adduced a written statement dated 11th March 2024 sworn by its operations manager on the same date, after this Office had conducted a site visit to the Respondent's premises.
17. In addition, a copy of the Respondent's Terms and Conditions was adduced and the same indicates how the Respondent operates concerning the loans it disburses to its customers.
18. The Respondent further produced as evidence a Copy of Central Bank of Kenya (CBK) correspondence concerning their DCP license application submitted on 18th August 2023 which set out the licensing requirements as provided for by the CBK.
19. Lastly, the Respondent produced a copy of contractual agreement with an outsourcing agency/ company.

E. INVESTIGATIONS UNDERTAKEN

20. On 11th March 2024, this Office, in the exercise of its investigative powers as envisaged under Section 9 of the Act, conducted a site visit on the Respondent's premises.
21. The site visit aimed to assess how the Respondent had implemented the Act and to review and validate the Respondent's response concerning the complaint filed with the Office.
22. To foster fairness, the Respondent was informed of the site visit prior to the visit. The Respondent was to secure and ensure the attendance of the following persons on the date of the site visit:-
- a) The Data Protection Officer (if any);
 - b) An ICT personnel with access and sufficient knowledge of the Respondent's systems including databases;
 - c) A Representative of the Respondent authorized to issue an official statement on behalf of it; and
 - d) A Representative of the employee of the Respondent.

23. From the site visit, the Office made the following findings:-

- a) The Terms and Conditions on the Respondent's money lending Application were different and inconsistent from what was availed to the Office during the site visit.
- b) The Respondent's guarantor notification system was not functional.
- c) The incident reporting mechanism was not functional.

24. The Office, however, could not conduct a proper investigation into the Respondent's databases and systems as the Respondent did not avail the required ICT personnel for these purposes despite being informed to avail the same before the site visit.

F. ISSUES FOR DETERMINATION

25. Having considered the nature of the complaint, the evidence adduced by all parties to the complaint, and the investigations conducted by this Office, the issues for determination are therefore:

- i. Whether the Respondent has violated the Data Protection Act; and
- ii. Whether there are remedies available against the Respondent.

I. WHETHER THE RESPONDENT HAS VIOLATED THE DATA PROTECTION ACT

26. To fully address this issue we will address it in terms of the following two questions:-

- a) Was the complainant's personal data processed lawfully?
- b) Did the Respondent fully cooperate with this Office as required by the law?

a. Was the complainant's personal data processed lawfully?

27. From the allegations put forth by the Complainant, it is evident that the complaint relates to the processing of personal data wherein the Complainant alleges that she received a message from the Respondent demanding payment from her as a

guarantor of a loan taken by a certain third party, yet she never guaranteed the said third party.

28. Section 2 of the Act defines processing as *"any operation or sets of operations which is performed on personal data or on sets of personal data whether or not by automated means such as:- (a) collection, recording, organization, structuring; (b) storage, adaptation or alteration; (c) retrieval, consultation or use; (d) disclosure by transmission, dissemination, or otherwise making available; or (e) alignment or combination, restriction, erasure or destruction."*

29. The above definition augments the earlier stated position that at all material times the Respondent was processing the Complainant's personal data.

30. Having established that indeed all the while the Respondent was processing the Complainant's personal data, we now turn to the question on whether the Complainant's personal information/data was lawfully processed.

31. Section 30 of the Act provides the lawful bases for processing personal data. It provides:-

30. Lawful processing of personal data

(1) A data controller or data processor shall not process personal data, unless
(a) the data subject consents to the processing for one or more specified purposes;
or

(b) the processing is necessary-

(i) for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject before entering into a contract;

(ii) for compliance with any legal obligation to which the controller is subject;

(iii) in order to protect the vital interests of the data subject or another natural person;

(iv) for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(v) the performance of any task carried out by a public authority;

(vi) for the exercise, by any person in the public interest, of any other functions of a public nature;

(vii) for the legitimate interests pursued by the data controller or data processor by a third party to whom the data is disclosed, except if the processing is unwarranted in any particular case having regard to the harm and prejudice to the rights and freedoms or legitimate interests of the data subject; or

(viii) for the purpose of historical, statistical, journalistic, literature and art or scientific research.

(2).....

32. The above-stated bases are the lawful instances upon which a data controller, the Respondent herein, should have processed the Complainant's personal data.

33. During the site visit conducted on 11th March 2024, the Office noted and observed that indeed the Respondent did not process the personal data collected by it as per the Act. Specifically, upon testing the Respondent's guarantor notification mechanism, it was noted that the same was not operational.

34. The Office also noted that the Terms and Conditions appearing on the Respondent's applications differed greatly from what was presented to this Office during the site visit. Additionally, upon testing the incident reporting mechanism it was also non-operational and ineffective. The incident reporting mechanism did not yield any results at all.

35. As such, it is the finding of this Office that the processing of the Complainant's personal data was not done lawfully.

36. In as much as it has been established that the processing of the Complainant's data was not done lawfully, in the course of our investigations, the Respondent resolved the complaint with the complainant in line with Regulation 11 (1)(b) of the Enforcement Regulations.

37. Regulation 11 (1)(b) of the Regulations provides that; *"Upon admission of a complaint, the Data Commissioner shall notify the respondent of the complaint*

lodged against him, in form DPC 3 set out in the schedule and shall require the respondent to within twenty-one days review the complaint with a view of summarily resolving the complaint to the satisfaction of the complainant”

38. The resolution of the complaint was confirmed by the Complainant to this Office via e-mail on 11th March 2024.

b. Did the Respondent fully cooperate with this Office as required by the law?

39. Cooperation with this Office while carrying out its functions as stipulated in the Act is a requirement on the part of data controllers and data processors. This is envisaged under Section 61 of the Act which states:-

61. Obstruction of Data Commissioner

A person who, in relation to the exercise of a power conferred by section 9-

- (a) Obstructs or impedes the Data Commissioner in the exercise of their powers;*
- (b) Fails to provide assistance or information requested by the Data Commissioner;*
- (c) Refuses to allow the Data Commissioner to enter any premises or to take any person with them in the exercise of their functions;*
- (d) Gives to the Data Commissioner any information which is false or misleading in any material aspect,*

Commits an offense and is liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years, or to both.

40. During the site visit conducted by this Office, despite informing the respondent of the same the Respondent did not cooperate fully with this Office. It did not avail the required personnel required to conduct a complete and comprehensive investigation, especially concerning its systems and databases.

41. The personnel that were availed were not the ones specified in the letter notifying them of the site visit. Further, the personnel availed did not know the organization and the Respondent's systems and how the said databases work. In summary, the personnel availed were not useful for purposes of the specific investigations.

As such the investigations were curtailed by the Respondent in total disregard of the site visit notification.

42. As such, the failure, refusal, and or total disregard of the Respondent to avail the required personnel as per the site visit notification amounts to non-cooperation and obstruction of this Office in the carrying out of its duties.

III. WHETHER THERE ARE ANY REMEDIES AVAILABLE AGAINST THE RESPONDENT.

43. Pursuant to Regulation 14 (2) of the Enforcement Regulations, a determination shall state the remedies entitled to the parties. Further, the remedies are provided for in Regulation 14 (3) of the Enforcement Regulations.
44. The Complainant confirmed to this Office that the complaint had been resolved to her satisfaction and thus she is not entitled to any remedy.
45. As regards the Respondent, Regulation 14(3)(d) of the Enforcement provides that the Data Commissioner may recommend for prosecution of any party. As stated above, obstruction of the Data Commissioner is an offence under Section 61 of the Act.
46. However, since the complaint was resolved amicably between the Complainant and the Respondent, a recommendation for prosecution shall not ensue in this instance.

G. FINAL DETERMINATION

47. In consideration of all the facts of the complaint, the evidence tendered and the investigations conducted, the Data Commissioner makes the following final determination:

- i. The complaint against the Respondent has been summarily resolved to the Complainant's satisfaction.

[Handwritten signature]

- ii. Parties have the right to appeal this determination to the High Court of Kenya within 30 days.

DATED at **NAIROBI** this 2nd day of April 2024



Immaculate Kassait, MBS
DATA COMMISSIONER

