



**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 0121 OF 2024**

JOE KIRANYA.....COMPLAINANT

-VERSUS-

BLACK AND GOLD EXECUTIVE BARBERSHOP.....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 alleging that the Respondent used his image online and on printed placards without his consent to advertise themselves on their social media pages.

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 19th 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 8th February 2024 referenced ODPC/CONF/1/5 VOL 1 (788). 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. The legal basis relied upon to use the complainant's personal data;
 - d. A detailed description on how they fulfil the duty to notify under Section 29 of the Act.
 - e. Evidence as to whether the complainant consented to processing of their personal data;
 - f. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
 - g. The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again;
 - h. Any other information they would wish the Office to consider.
8. The Respondent failed to respond to the allegations and therefore this determination is premised upon Regulation 11 (2) of the Enforcement Regulations.

D. NATURE OF THE COMPLAINT

9. The Complainant alleged that the Respondent used his images both online and on printed placards without his consent to run advertisements at their premises and online on their social media pages.
10. He stated that he tried to reach out to the Respondent through a demand letter written to them through his advocates to no avail.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED THE COMPLAINANTS' CASE

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11. The Complainant filled the complaint form and gave the relevant details required to file his complaint.
12. He availed the demand letter dated 20th January 2022 written to the Respondent and proof of his images posted on the Respondent's social media pages.

F. ISSUES FOR DETERMINATION

13. 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; and
 - ii. 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

14. 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 (c) the Complainant had the right to object to the processing of his personal data as per Section 26 (c) of the Act. Further, section 36 also provides for the right of objection to the processing of a data subject's personal data, **unless** the data controller or data processor demonstrates compelling legitimate interest for the processing which overrides the data subject's interests, or for the establishment, exercise or defense of a legal claim.
15. Regulation 8 (1) of the General Regulations stipulate that pursuant to Section 36 of the Act, a data subject may request a data controller or data processor not to process all or part of their personal data, for a specified purpose or in a specified manner. Sub-regulation 3 provides that a data controller or data processor **shall**, without charging any fee, comply with a request for objection within **fourteen days** of the request.
16. The Complainant requested the Respondent to his photo from their social media pages via a letter dated 20th January 2022. Up until the date of this determination, the Respondent has neglected and/or ignored to pull down the Complainant's image from its social media pages.
17. The Respondent did not respond to the allegations made against it and as such, this Office only considered the evidence adduced by the Complainant pertaining his complaint.
18. The Complainant made this request on 20th January 2022 and as at the date of this determination, the Complainant's image was still up on the Respondent's social media pages without his consent.

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

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

20. 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.

21. 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.

22. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's rights under Section 26 (c) was infringed upon by the Respondent. The Respondent failed to adhere to the Complainant's request to have his images pulled down from its social media pages.

23. In this regard, the Respondent is hereby ordered to pay the Complainant **Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000)** for the infringement of his rights under Section 26 (c) of the Act.

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for infringement of the Complainant's rights under Section 26 (c) of the Act;
- ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000)** 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 17th day of April 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER