



OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 0099 OF 2024

ESTHER MAREKA SUING ON BEHALF OF
M.N(MINOR).....COMPLAINANT

-VERSUS-

HENNER GMC.....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's used her son's personal data during a training session without her knowledge or 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 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 16th January 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 (3) of the Enforcement Regulations from the Complainant who lodged this complaint on behalf of her son, a minor.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 16th January 2024 referenced ODPC/CONF/1/5 VOL 1 (786). 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 minor's data for training purposes;
 - d. Whether they fulfilled the duty to notify under Section 29 of the Act and how the same was fulfilled prior to the further processing of the minor's data;

- e. Details of all the minor's personal data used in the training;
 - f. Whether the Complainant consented to further processing of the minor's personal data;
 - g. Details of how they ensure the processing of personal data is limited to the purpose it was collected for;
 - h. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
 - i. The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again; and
 - j. Any other relevant information they wish the Office to consider.
8. The Respondents responded to the allegations *vide* a letter dated 22nd February 2024.

D. NATURE OF THE COMPLAINT

9. The Complainant alleged that on 5th July 2023, she received an email from the Respondent's official email address concerning the hospitalization of her son at a certain hospital in Uganda on diverse dates in June 2023.
10. She stated that at the time of the alleged hospitalization, she was away in another country attending a conference and therefore, the email alert caused her great confusion as she was not aware of her son being hospitalized.
11. The Complainant stated that she reached out to the Respondent their email address – network@henner.com, which they confirmed that the data belonging to her son had been used during a training session in Uganda by one of their staff.
12. Further, she indicated that the Respondent referred to the situation as "*accidental use of real member details in training a healthcare partner in your network*" therefore belittling the situation even after continuous communication through emails and letters through her advocates.
13. The Complainant sought an admission of liability and sufficient compensation for infringements of her son's personal data.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

14. The Complainant provided the email correspondence between herself and the Respondents and letters sent to the Respondent through her advocates, including a demand letter dated 3rd October 2023.

ii. THE RESPONDENT'S RESPONSE

15. The Respondent filed a response to the notification of complaint dated 23rd February 2024 and indicated that the data was processed by Henner Kenya Limited and not Henner GMC.

16. The Respondent stated that based on the nature of their business, they normally process invoices from healthcare providers (including TMR Hospital) for the services they offer to their insured members including the Complainant.

17. The Respondent indicated that to ensure no fraud is committed, and that the healthcare provider provides services to eligible members, they conduct training on how to use their healthcare provider portal. This explains the reason for the training carried out for TMR Hospital, the alleged third party.

18. The Respondent stated that such healthcare providers are part of its network and sign an agreement with them to ensure the protection and confidentiality of personal data and compliance with the appropriate data protection regulations.

19. The Respondent confirmed that, contrary to their internal processes, they indeed carried out a training and test, using the Complainant's son's name, his date of birth, and Henner's member ID that they had in their system. However, the rest of the details were fictitious and the training generated the erroneous sending of a guarantee payment to the Complainant on the 5th of July 2023.

20. Following the incident, they immediately acknowledged the error and apologized to the Complainant through emails from both the network team and the healthcare provider on diverse dates in July 2023 and they took all the measures to ensure the error was corrected by asking and confirming that the healthcare provider deleted the details wholly from their systems.
21. The Respondent then stated that they received a letter from the Complainant's lawyer on 3rd October 2023 indicating that the incident led the Complainant to severe emotional distress and asking for an admission of liability in order to engage further discussions on the quantum of sufficient compensation. They responded to the letter on 17th October 2023.
22. In their response, the Respondent indicated that in accordance to Section 43 of the Data Protection Act, they did not notify the Office of the data breach because the incident did not constitute a real risk of harm to the Complainant regarding his privacy.
23. That no health data were broadcasted during the training session, and that they immediately took all appropriate measures to resolve the incident and to mitigate the consequences to the Complainant.
24. The Respondent confirmed that only the first and last names of the insured, date of birth and HENNER's member ID were used during the training session and no other personal data, particularly health data was broadcasted during the training session and they took all appropriate measures to resolve the incident and to mitigate the consequences for the Complainant.
25. The Respondent stated that the Complainant did not suffer any harm or damage as a result of the incident from her interaction with the organization, and therefore they are not entitled to claim any compensation.
26. The Respondent relied on the legitimate interest under Section 30 of the Act to improve the quality of its services as the lawful basis to use the minor's data for training purposes.
27. In response to the duty to notify under Section 29 of the Act, Respondent indicated that personal data is strictly processed in accordance with their GDPR

Insured Charter which is communicated to their insured at the time of application to be insured.

F. ISSUES FOR DETERMINATION

28. In light of the above, the complaint, the Respondent's response and evidence adduced, the following issues fall for determination by this Office:

- i. Whether there was an infringement of the minor'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 MINOR'S RIGHTS UNDER THE ACT

29. Article 53 (2) of the Constitution of Kenya, 2010 provides that a child's best interests are of paramount importance in every matter concerning the child.

30. The Act under Section 27 (a) provides that a right conferred on a data subject may be exercised where the data subject is a minor, by a person who has parental authority or by a guardian.

31. The Office further observes that Section 26 (a) of the Act provides that a data subject has the right to be informed of the use to which their personal data is to be put. The minor therefore, through the complainant, had the right to be informed of the use to which his personal data was to be put. It is not in dispute that the Complainant gave the minor's details to the Respondent, however, it was for insurance purposes and not training purposes.

32. Therefore, it is this Office's finding that the Respondent infringed on the minor's rights under Section 26 (a) of the Act.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

33. The Respondent indicated in its response that it is registered with this Office as both a data controller and processor. As such, the Act provides for certain mandatory obligations for them.

34. Section 25 of the Act provides for the principles of data protection. Specific to this complaint, every data controller or data processor shall ensure that personal data is;

- i. Processed in accordance with the **right to privacy of the data subject**;
- ii. Processed lawfully, fairly and in a transparent manner in relation to any data subject;
- iii. Collected for **explicit, specified and legitimate purposes** and not further processed in a manner incompatible with those purposes;
- iv. Collected **only where a valid explanation** is provided whenever information relating to family or private affairs is required.

35. Further to the above, 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**.

36. It is not in dispute that the Complainant consented to the use of her child's personal data for purposes of insurance. However, the Respondent should have sought express consent to the use of the names and date of birth of the child with regards to the training. It was an erroneous mistake as admitted by the Respondent and therefore the burden under Section 32 of the Act was not discharged as such.

37. With regards to the processing of personal data relating to a child, Section 33 of the Act provides for processing of personal data relating to a child and states that;

- (1) Every data controller or data processor **shall not** process personal data relating to a child **unless-**
 - (a) **Consent** is given by the child's parent or guardian; and
 - (b) The processing is in such a manner that **protects and advances the rights and best interests of the child**.

38. The consent contemplated under Section 33 of the Act is mandatory from the wording of the Act. The Respondent indicated that the child's first and last name and his date of birth were used during the training, albeit erroneously. These

details constitute the minor's personal data which should be guarded at a higher standard due to the vulnerable nature of children. The child's best interest is paramount as stipulated under the Constitution of Kenya.

39. The Respondent relied on Section 30 of the Act with regards to the lawful processing of the minor's personal data basing it on legitimate to improve the quality of its services. The provision of Section 30 on legitimate interest as a lawful basis for processing personal data states that:

"a data controller or data processor shall not process personal data unless the processing is necessary 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"

40. The improvement of the quality of the Respondent's services therefore cannot be said to be the basis of processing the minor's personal data based legitimate interest. The argument by the Respondent in this regard is therefore flawed and incorrect.

41. While it is noted that the Respondent immediately corrected the error, the damage had already been done. The Respondent should have ensured that such errors do not and cannot occur especially with regards to minors' personal data.

42. 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.

43. 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.

44. 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.

45. In considering whether to issue compensation, this Office takes into consideration the fact that the minor's rights under Section 26 (a) was infringed upon by the Respondent. The Respondent failed to inform the Complainant of the use of her child's personal data without her consent. Children's data should be protected at a high level at all times.

46. The Office has also taken into consideration the measures taken by the Respondent to correct the erroneous mistake.

47. In this regard, the Respondent is hereby ordered to pay the Complainant the following:

- i. **Kenya Shillings Five hundred Thousand (KES 500,000)** for unlawful use of the minor's personal data that is his full names and date of birth for training purposes which was not the original purpose for the collection of the said information.
- ii. **Kenya Shillings Three Hundred Thousand (KES 300,000)** for the infringement of the minor's rights under Section 26 (a) on the right to inform a data subject and for failing to obtain consent from the Complainant in the use of her child's personal data.

48. The Total compensation awarded to the Complainant is therefore **KES 800,000 (Kenya Shillings Eight Hundred Thousand)**.

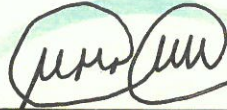
49. The Respondent is also in violation of several obligations under the Act as analyzed above and therefore, pursuant to Section 58 of the Act, an Enforcement Notice shall be issued against the Respondent.

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for infringement of the minor's rights and non-compliance of its obligations under the Act;
- ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Eight Hundred Thousand (KES 800,000)** 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 14th day of April 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**