



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0114 OF 2024

TABITHA MWANIKI..... COMPLAINANT

-VERSUS-

ROSE GATABAI T/A TIARA NAIL SPA.....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 Complaint herein relates to a complaint by the Complainant wherein she alleges the Respondent breached her privacy by issuing a public notice notifying the public that she no longer works for the Respondent when the employment contract between the two was terminated.

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

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 (hereinafter 'the Complainant') on 18th 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. Pursuant to Regulation 11 of the Enforcement Regulations, on 7th 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 (763). The Respondent was to provide its response to the complaint within 14 days from the date of receipt of the notification letter.
7. On 21st February 2024 the Respondent responded to the notification letter.
8. This determination is therefore 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

9. It was the complainant's case that after the Respondent fired her she went ahead and posted on the Instagram and facebook business pages of Tiara Nail Spa Nakuru, a public notice with the Complainant's photo that she does not represent the company any more.

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10. It was the complainant's case that this public notice elicited many phone calls from numerous people to the complainant asking if she had done any criminal dealings to her former employer as the post was misleading.
11. The Complainant stated that she requested through a message for the photo to be pulled down as she had not done anything criminal as the public was already thinking (through the phone calls and comments on the photos) that she was a criminal, which would deter her from getting another job as she is jobless.
12. The Complainant contended that the Respondent refused to take it down and told her to go ahead and report to the police if she pleased.

II. RESPONDENT'S RESPONSE

13. In its response, the Respondent stated that she had an employer- employee relationship with the Complainant by dint of a work agreement between them dated and executed on 25th October 2023.
14. That as a beauty salon, the Respondent provided nail care services as well as make up services and as part of marketing and with consents of either clients or employees, photographs and at times videos of them are taken before, during or after the said services are provided. Thereafter the said photographs are uploaded to the Respondent's social media handles which is done with the knowledge and consent of the client or employee.
15. The Respondent further stated that one such photograph and video taken was of the complainant herein. The video was taken to highlight the process of applying makeup and the photograph was taken after to show the end result. Upon the same being posted on the 5th of January 2024, the Complainant went ahead to like the same on the social media handles and further went ahead to make the same public on her own account by sharing the same on her personal social media handles.
16. The Respondent stated clause no. 2 of the work agreement on client's protocol is very categorical as pertains who the clients are and how to interact with them. It

further explicitly provides that employment contract of any employee/ nail technician who breaches the same shall be terminated with immediate effect.

17. Unfortunately, the complainant with full knowledge of the said terms willfully breached the said clause and as a consequence of the Complainant's breach, her services were terminated on 9th January 2024.
18. That upon termination and since the customer base so far established by the Respondent through the various social media handles were well aware that the Complainant was the Respondent's employee there was need to notify the public via the same social media handles that the Complainant no longer worked for the Respondent. This notification to the public was done on 11th January 2024 upon termination of the Complainant's contract.
19. That pursuant to the Complainant's conduct there came a need for the Respondent to dissociate herself with the Complainant to protect the brand name and interests. Additionally, there came a need to indemnify and/ or shield herself from any liability that might arise as a result of the complainant's action, inaction or omissions after termination.
20. That as it can be clearly deduced from the wordings of Tiara Nail Spa post, the said upload is merely a public notice that the complainant is no longer an employee and this can certainly pass the test of a reasonable person
21. The Respondent further stated that the Complainant had given her consent for the collection of her personal data and she is the one who made it public when she shared the same on her social media platforms.
22. The Respondent further stated that she has since deleted all the photos and videos of the complainant from all its client's social media accounts.

D. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

23. The Complainant, submitted her complaint *via* the Office's e-mail on 18th January 2024. As part of her evidence, she attached Screen shots of messages between

her and the Respondent and the public notice posted by the Respondent on the Respondent's social media pages. The notice read:-

"Tiara Nail Spa, Nakuru Post

The said person does not represent Tiara Nail Spa in any dealings as an employee, an agent or as a business associate. Any dealings with the said person on behalf of Tiara Nail Spa in any capacity shall not bind the company nor its directors. BE DULY NOTIFIED"

II. THE RESPONDENT'S EVIDENCE

24. The Respondent adduced as its evidence a copy of the work agreement between the Complainant and the Respondent, screenshots of the said photograph/ data on various social media platforms, and a termination notice.

E. 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 question:-

- a) Did the Respondent Act within the law by issuing a public notice to its customers on all its platforms informing them that the Complainant no longer works for them?

Did the Respondent Act within the law by issuing a public notice to its customers on all its platforms informing them that the Complainant no longer works for them?

27. From the allegations put forth by the Complainant, it is evident that the complaint revolves around the Respondent issuing a public notice to its customers on all its platforms. The public notice was that the Complainant was no longer an employee with the Respondent.

28. In her response the Respondent stated that it posted the public notice to notify the public via the same social media handles that the complainant no longer works for them. According to the Respondent, the notice was to dissociate herself and her brand from the complainant who was no longer their employee. In short, the Respondent was acting on public interest.

29. Section 51 (2) of the Act provides for exemptions to the Act. it provides that

51(2) The processing of personal data is exempt from the provisions of this Act if:-

- (a) It relates to processing of personal data by an individual in the course of a purely personal or household activity;*
- (b) If it is necessary for national security or public interest, or*
- (c) Disclosure is required by or under any written law or by an order of the court. (emphasis ours)*

30. Regulations 55 and 56 of the Data Protection (General) Regulations, 2021 further expounds the above provision of the Act as follows.

55. Exemptions for public interest

For the purposes of section 51(2)(b) of the Act, the processing of personal data is exempted from the Act on the grounds of public interest where such processing exists as a:-

- (a) Permitted general situation; or*
- (b) Permitted health situation.*

56. Permitted general situation

A permitted general situation referred to under regulation 55 (a) relates to the collection, use or disclosure by a data controller or data processor of personal data about data subject including for—

(a) lessening or preventing a serious threat to the life, health or safety of any data

subject, or to public health or safety;

(b) taking appropriate action in relation to suspected unlawful activity or serious

misconduct;

(c) locating a person reported as missing;

(d) asserting a legal or equitable claim;

(e) conducting an alternative dispute resolution process; or

(f) performing diplomatic or consular duties (emphasis ours)

31. We have had a chance to look at the public notice. From the contents of the public notice it is indeed true that the notice was to notify the public that the Complainant does not work for the Respondent. By making the public aware that the complainant was not working for the Respondent, the Respondent was indemnifying and/ or protecting herself from any liability that might arise as a result of the complainant's action, inaction or omissions after termination.
32. As such, considering the Respondent was acting within the ambit of public interest, it therefore follows that the Respondent acted within the law and did not violate the Act and its attendant regulations.
33. Additionally, we also note that Respondent has since deleted the impugned notice and all the photos and videos of the complainant from its platforms.

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

34. 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.
35. Having established that the Respondent acted within the law and that she has gone a step further and deleted all the impugned posts, it therefore follows that the Complainant is not entitled to any remedy under the Act.

F. FINAL DETERMINATION

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

DATED at **NAIROBI** this 16th day of April 2024



Immaculate Kassait, MBS
DATA COMMISSIONER