



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0129 OF 2024

PAUL OGOLA.....COMPLAINANT

-VERSUS-

SHALINA HEALTHCARE KENYA LIMITED.....1ST RESPONDENT

VIVID FEATURES LTD.....2ND 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 1st Respondent was actively using his image for their online campaigns, on erected billboards, posters, moving pictures, website advertisements and printed calendars without his knowledge or consent after the contract period between himself and the 1st Respondent had ended.

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 22nd January 2024 through his advocates. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 (3) (b) 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 1st Respondent of the complaint filed against it *vide* a letter dated 8th February 2024 referenced ODPC/CONF/1/5 VOL 1 (785). 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 lawful basis relied upon to continue processing the Complainant's personal data;
 - d. Evidence as to whether the Complainant consented to the further processing of his personal data;
 - e. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
 - f. The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again; and
 - g. Any other information they would wish this Office to consider.
8. The 1st Respondent responded to the allegations *vide* a letter dated 26th February 2024.
9. From their response, it became apparent that Vivid Features Limited was significantly involved in the complaint. Pursuant to Regulation 12 (1) Vivid Features Limited was consequently enjoined as a party to the complaint. The Office enjoined them as the 2nd Respondent and notified them of the complaint via a letter dated 13th March 2024 referenced ODPC/CONF/1/5/VOL 1(869).
10. In the notification of the complaint, the 2nd 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 allegations made against them;
 - b. Any relevant materials or evidence in support of your response above;
 - c. A confirmation of the validity of the agreement dated 12th February 2022 between yourselves and the Complainant;
 - d. Whether the Complainant consented to the continued use of his personal data for advertisement after the lapse of the agreement;

e. Proof of your affiliation with Shalina Healthcare Kenya Limited or any valid agreement that grants you the authority to enter into contracts on behalf of the organization.

f. Any other information you wish the Office to consider.

11. The 2nd Respondent responded to the allegations via a letter dated 27th March 2024.

D. NATURE OF THE COMPLAINT

12. The Complainant entered into a contract with the 1st Respondent which permitted the latter to use the Complainant's image for an online campaign to advertise a product known as Pharmasal for a period of six (6) months. The contract period started on 12th February 2022 and was to end on 12th August 2022 as per the agreement.

13. In August 2023, the Complainant alleged that he discovered that the 1st Respondent was still actively using his image for not only their online campaigns but had extended the use of his image on erected billboards, posters, moving pictures, website advertisement, printed calendars, among other uses without his knowledge or consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

14. The Complainant stated that the Respondent used his image after their contract had ended and beyond the purposes to which they had agreed upon without his further consent. The Complainant adduced a copy of the agreement as proof of the same.

15. The Complainant attached the following as evidence of his allegations:

- i. a recording showing the erected billboard bearing the Complainant's image;

- ii. a recording showing the Complainant's images still on the 1st Respondent's social media pages;
- iii. screenshots of the 1st Respondent's website as at 25th August 2023 and
- iv. a photo of calendars by the 1st Respondents.

16. The Complainant stated that not only did the 1st Respondent breach the contractual timelines for using his image by still having his image for online advertisement, but they also illegally used his image acquired only for an online campaign for further advertising without his knowledge or consent.

17. The Complainant indicated that despite attempts, through his advocate, to reach out to the 1st Respondent to get them to acknowledge the infringement and discuss quantum as per the Complainant's rate card, they have ignored such efforts hence necessitating filing of this complaint. The Complainant attached a copy of his rate card and letters sent to the 1st Respondent inviting them for negotiations.

ii. THE 1ST RESPONDENT'S RESPONSE

18. The 1st Respondent filed a response to the notification of complaint on 26th February 2024 and stated that there was no contract between themselves and the Complainant as alleged.

19. The 1st Respondent indicated that in October 2023, they wrote to the Complainant's advocate in response to a similar claim by the Complainant. They attached the letter as proof of the same.

20. The 1st Respondent denied being a party to the contract which the Complainant adduced and stated that the Complainant contracted with Vivid Features Limited, a party stranger to them. Therefore, they denied any allegation of use of the Complainant's image.

21. The 1st Respondent stated that it does not use the Complainant's personal data on any of its online platforms, erected billboards, posters, moving pictures and websites as alleged. They claimed that the Complainant did not produce any

cogent evidence of the unlawful or illegal use of his personal data on any of those platforms as alleged.

22. The 1st Respondent prayed that the complaint be dismissed.

iii. THE 2ND RESPONDENT'S RESPONSE

23. The 2nd Respondent indicated that they should not be enjoined as a party in the complaint, but gave an account of the facts that led to this complaint.

24. The 2nd Respondent stated that it is a production house and its services include production of marketing images and videos.

25. The 2nd Respondent explained that in December 2021, they were hired by an agency called Dotsavvy Limited (the agency) to produce images and videos which were meant to run a social media campaign for a product called Pharmasal. The product was owned by the 1st Respondent and the images and videos were therefore being produced for use by the 1st Respondent. The agency was contracted by the 1st Respondent and they in turn hired the 2nd Respondent as the production house.

26. They then casted the Complainant and requested to use his images, through a commercial agreement. The Complainant agreed to the use of his images and an agreement was entered into between the 2nd Respondent and the Complainant on 12th February 2022. The 2nd Respondent availed a copy of the Agreement as proof of the same.

27. As agreed, the agreement was to run for six (6) months. The 2nd Respondent produced the images in terms of video/photo shooting and editing. They alleged that all along during production of the images and videos, the 1st Respondent was in the picture and shared comments/feedback, approvals etc as the images and videos were being prepared.

28. On or around May 2022, the images and videos were presented to the 1st Respondent. The 2nd Respondent availed email correspondence relating to instructions to produce the images and videos and the handing over of the images and videos to the 1st Respondent.

29. The 2nd Respondent indicated that from the agreement and correspondence referred above, the images and videos were to be used for social media campaigns by the 1st Respondent and the agreement did not include use of the images on billboards or calendars.
30. The 2nd Respondent stated that upon expiry of the agreement, they never shared, used or entered into any arrangement with any party to use the Complainant's images or videos.
31. In August 2023, they received a demand letter from the Complainant stating that his images were being used by the 1st Respondent on billboards all over the country without his consent. The 2nd Respondent attached a copy of the demand letter as proof of the same.
32. The 2nd Respondent stated that upon receipt of the demand letter, they wrote to the 1st Respondent and reiterated the Complainant's concerns that they were using his images outside the agreed period and therefore advised them to engage the Complainant and resolve the matter. They attached a copy of the letter to the 1st Respondent as proof of the same.
33. The 2nd Respondent indicated that they should not be held liable and the 1st Respondent should be held to account for misleading this Office that it has never used the Complainant's image yet it did do and commercially benefitted from the use of his images. The Complainant's images were produced for their use and the email correspondence is proof of the same.
34. The 1st Respondent should be held liable for continuous use of the Complainant's images after expiry of the contracted period and use of the images for purposes they were never meant to be used from the onset such as billboards and calendars.
35. The 2nd Respondent indicated that the 1st Respondent should be held to account for failure to disclose material facts and misleading that it was not aware of their existence.
36. The 2nd Respondent prayed that any claim against them should be dismissed.

F. INVESTIGATIONS UNDERTAKEN

37. Subject to investigations of the documents presented to this Office as evidence, it was noted that the contract adduced by the Complainant was between himself and Vivid Features Ltd thereby prompting the latter to be enjoined as a party to this complaint as indicated above. However, the contract had a statement stating that:

"Vivid Features Ltd is making the Pharnasal Advert on behalf of Shalina Healthcare Kenya Limited. The manufacturer of Pharnasal spray and ointment."

38. The contract also stated that *"any option to extend or add to the different media options that are available shall be provided through a separate document."*

39. In an email dated 12th April 2022, there was an invitation for "Pharnasal Videos Review". The email was sent from xxx@dotsavvyfrica.com to xxx@vividfeatures.com and xxx@shalina.com.

40. Most of the email correspondence were between the agency and the 2nd Respondent, with some involving the 1st Respondent. There was a clear principal-agent relationship between the 1st Respondent and the agency.

G. ISSUES FOR DETERMINATION

41. In light of the above, the complaint, the Respondents' responses and evidence adduced together with the investigations conducted, the following issues fall for determination by this Office:

- i. Whether there was an infringement of the Complainant's rights under the Act;
- ii. Whether the Respondents fulfilled their 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 COMPLAINANT'S RIGHTS UNDER THE ACT

42. 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 (a) the Complainant had the right to be informed of the use to which his personal data was to be put, in this case, the use of his photo by the 1st Respondent after the lapse of the contract period.

43. From the evidence adduced and investigations conducted by this Office, the Complainant was not informed that his image would be further used by the 1st Respondent on its social media pages after the lapse of the contract period.

44. The Complainant was able to prove to this Office through the evidence he provided that indeed the 1st Respondent continued to use his image for advertisement of its product after the contractual period had ended. For instance the calendar with the complainant's image was for the year 2023 and the social media campaigns were used in 2024.

45. Therefore, this Office finds that the Complainant's right under Section 26 (a) and was infringed by the 1st Respondent. The 2nd Respondent proved its case in this complaint and is therefore not liable for the infringement of the Complainant's rights under the Act.

II. WHETHER THE RESPONDENTS FULFILLED ITS OBLIGATIONS UNDER THE ACT

46. The 1st Respondent is a data controller as per the definitions of the Act and is therefore mandated to fulfil its obligations as such under the Act. As per the evidence adduced, the 2nd Respondent is a data processor and acted upon the instructions of the 1st Respondent for purposes of this complaint, and equally had obligations to fulfil under the Act.

47. Section 25 (c) of the Act provides that every data controller or data processor **shall** ensure that personal data is collected for explicit, specified and legitimate purposes and **not further processed in a manner incompatible with those purposes.**

48. The contractual agreement between the Complainant and the 2nd Respondent stipulated that:

"This agreement specifically covers the online publications of video and photos for the above product for a period not exceeding six months inclusive of the three-month campaign period where the advert will be placed on the internet. Any option to extend or add to the different media options that are available shall be provided through a separate agreement."

49. From the above provision, it is clear that once the six months lapsed, the Complainant's images were not to be used unless a separate agreement was entered into. The 1st Respondent continued to use the Complainant's image and further processed his image in other forms including a billboard and on their calendars contrary to the contractual agreement and the provisions of Section 25 (c) of the Act.

50. Section 30 of the Act provides for the lawful processing of personal data and stipulates under sub-section (2) that further processing of personal data **shall** be done in accordance with the purpose of collection.

51. The language of the above provision indicates a mandatory obligation upon data controllers and data processors with regards to further processing of personal data. The 1st Respondent went ahead to further process the Complainant's image not as per the initial purpose of collection hence being in contravention of the provision under Section 30 (2) of the Act.

52. 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. The 1st Respondent did not discharge this burden by proving that the Complainant consented to the processing of his image way after the lapse of the contract period. They instead denied having any contractual relationship with the Complainant which, as per the evidence adduced, was a false averment.

53. On the question of commercial use of data, the Act provides under Section 37 (1) (a) that 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 a data subject.
54. Regulation 14 (1) of the Data Protection (General) Regulations, 2021 (the General Regulations) provides for the interpretation of commercial purposes and provides that for the purposes of Section 37 (1) of the Act, a data controller or data 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.
55. The 1st Respondent used the Complainant's image on their website and social media platforms to advertise the Pharmasal product even after the lapsing of the contract period. Therefore, the 1st Respondent commercially gained from using the Complainant's images in its advertisements without his express consent.
56. In light of the above, this Office finds that the 1st Respondent did not fulfil its obligations under the Act.
57. In as much as the contract was between the Complainant and the 2nd Respondent, it was clear that the 2nd Respondent was making the advert on behalf of the 1st Respondent as indicated in the contract. Further, the Complainant's images were on the 1st Respondent's website and social media pages. Therefore, the 2nd Respondent was not in breach of any obligations under the Act with regards to this complaint.

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

58. 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.

59. 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.

60. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's rights under Section 26 (a) was infringed upon by the 1st Respondent. The Respondent failed to inform the Complainant the use of his image after the lapse of the contractual period. Further, the 1st Respondent used the Complainant's image for commercial purposes.

61. The Complainant adduced his rate card to this Office hence the basis for the order for compensation as follows:

- a) Image on billboard (outdoor advertising) – Kshs. 500,000
- b) Image on calendar (calendars)– Kshs. 500,000
- c) Image on website (websites) and social media pages – Kshs. 200,000
- d) Infringement of the right to be informed under section 26(a) of the Act- Kshs. 250,000

62. The total compensation order payable to the Complainant by the 1st Respondent is **Kshs. One Million, Four Hundred and Fifty Thousand (Kshs. 1,450,000).**

63. The 1st 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 1st Respondent.

H. FINAL DETERMINATION

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

- i. The 1st Respondent is hereby found liable for infringement of the Complainant's rights and non-compliance of its obligations under the Act;
- ii. The 1st Respondent to pay the Complainant a sum of **Kenya Shillings One Million, Four Hundred and Fifty Thousand (Kshs. 1,450,000)** as compensation;
- iii. An Enforcement Notice to issue against the 1st Respondent;
- iv. Complaint against the 2nd Respondent is dismissed.
- v. 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**

