



**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 0151 OF 2024**

WENDY MWATHA.....1ST COMPLAINANT
WINNIE WANJA.....2ND COMPLAINANT
ANNAH MBURU.....3RD COMPLAINANT
-VERSUS-
ACCESSORIZE WITH STYLE.....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 complainants lodged a complaint alleging that the Respondent continued to use their images for branding and advertising despite lapse of their contract.

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 (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 Complainants on 24th January 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 (3) (b) of the Enforcement Regulations from the Complainants' advocates on behalf of the Complainants who were the aggrieved data subjects.
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 (790). 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 Respondents were 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 continue processing the Complainants' personal data after the agreed-upon period and despite their objection;
 - d. A detailed description on whether and how they fulfilled the duty to notify under Section 29 of the Act;

- e. Details of how they obtain, store and process personal data relating to their branding;
 - f. Evidence as to whether the Complainants' consented to the processing of their personal data after the lapse of their agreements;
 - g. The mitigation adopted or being adopted to address the complaint to the satisfaction of the Complainants, if any;
 - h. The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again; and
 - i. Any other relevant information that you wish the Office to consider.
8. The Respondents filed an initial response to the notification of complaint on 19th February 2024.
 9. It is noteworthy that the parties attempted to mediate and settle the complaint facilitated by this Office as per Section 9 (c) of the Act, however, the mediation was unsuccessful thereby necessitating the complaint to be determined as per Regulation 15 (8) of the Enforcement Regulations.

D. NATURE OF THE COMPLAINT

10. The Complainants alleged that the Respondent continued illegal use of the Complainants' images for its in-store branding in multiple outlets hence an infringement of their privacy and illegal use of their image and likeness contrary to Article 31 (c) and (d) of the Constitution and several sections of the Act.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

11. The Complainants stated that they are models who offered their services to the Respondent under a contract which expired in 2020.
12. The Complainant's adduced an unsigned and undated contract dubbed "Model Release Form" which stated that:

"I hereby give Accessorize with Style consent to use any photos taken of me during this photo session managed by COUTURE Africa magazine.

This includes any and all photos taken of me, for the agreed compensation. All photographs shall constitute the sole property of Accessorize with Style, and can be used for any promotional activities including in-store branding, outdoor, print, social media, internet and posters across East Africa for a period not exceeding Three years."

13. However, according to the Complainants, despite the expiry of the contract and notice of the same provided to the Respondent through a demand letter dated 23rd October 2023, it continued to use the Complainants' images.
14. The Complainants' stated that the actions of the Respondent stand to harm their future possibilities for engagement in the industry and it caused them emotional and mental anguish.
15. Particularly, the 3rd Complainant is employed as a cabin crew and therefore the Respondent's actions would jeopardize her position with her employer due to conflict of interest.
16. The Complainants' alleged that the Respondents were notified of their infringing actions and they continue to use the Complainants' images in their stores.
17. The Complainant's sought the same reliefs they sought from the Respondent in their demand letter dated 23rd October 2023 being compensation of Kenya Shillings Six Million, Three Hundred Thousand (Kshs. 6,300,000) cumulatively for the unauthorized use of their images beyond the agreed-upon period.
18. In the demand letter, the Complainants based their compensation on the case of ***Wanjiru v Machakos University (Petition E021 of 2021) (2022) KEHC 10599 (KLR)*** where the Petitioner was awarded Kshs. 700,000 for violation of her right to privacy and human dignity under the Constitution of Kenya by publishing her image for commercial advertisement without her consent.

ii. THE RESPONDENT'S RESPONSE

19. The Respondent stated that they had never had a contract with the Complainants as they outsourced branding and sought the services of a third-party company for various marketing projects. It was therefore through these

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channels that the photographs of the Complainants ended up at some of its client's stores.

20. The Respondent stated that it was not privy to the contents of the contract between the Complainants and the third-party company and unfortunately, when the Complainants first approached them, the only evidence they adduced was an unsigned agreement in word version.

21. Additionally, the Respondent indicated that the Complainants contended that they consented to the use of their photographs as models at a fee from the third-party company. However, the Complainants did not provide any verification of this information.

22. The Respondent claimed that despite the details of the contract remaining unknown to them, and upon the Complainants' protest of the use of their images, they resorted to rebranding its few shops to avoid being in contravention of the Act.

23. The Respondent provided communication between themselves and the third-party company including an invoice dated 17th May 2017.

F. INVESTIGATIONS UNDERTAKEN

24. After careful analysis of the adduced evidence from both parties, this Office established that the Complainants' images were used by the Respondent in in-store branding in various stores in Kenya and Rwanda.

25. This Office also found that the images were still in the Respondent's stores in 2023.

26. The Complainant did not provide proof of the contract beginning 2017 that was allegedly for three years therefore this Office cannot ascertain the existence of the contract.

27. The Respondent did not provide evidence to prove that they sought consent from the Complainants to use their images in their in-store branding.

G. ISSUES FOR DETERMINATION

28. In light of the above, the following issues fall for determination by this Office:

- i. Whether there was a violation of 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 A VIOLATION OF COMPLAINANT'S RIGHTS UNDER THE ACT

29. Section 26 of the Act provides for the rights of a data subject under the Act. As such, the Complainants had the right to object to the processing of all or part of their personal data. Personal data is defined under Section 2 of the Act as any information relating to an identified or an identifiable natural person.

30. The Complainants were therefore well within their rights in requesting the Respondent to cease and desist from using their images for any purpose and to remove their images from any material in which they are currently featured.

31. The alleged contract between the Complainants and the Respondents was not adduced to this Office and therefore, this Office cannot ascertain whether there was continuous use of the Complainants images after the alleged contract had expired.

32. The Act gives instanced where a data controller or data processor can process personal data under Section 30. It stipulates that the data controller or data processor **shall** not process personal data, unless the data subject consents to the processing for one or more specified purposes or the processing is necessary for the circumstances under Section 30 (b).

33. Further, Section 32 (1) of the Act gives the conditions of consent and lays the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose.

34. In as much as the contract between the Complainants and the Respondent was not availed as proof of the same, there was evidence that the Respondent was using the Complainants image in their in-store branding without the consent of the Complainants.

35. The Respondent failed to prove and discharge the burden under Section 32 (1) of the Act to prove that they obtained consent from the Complainants to use their images.

36. On commercial use of personal 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.

37. 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.

38. Having the Complainants' images displayed in their in-store branding is commercial use of personal data which is prohibited under the Act and the Regulations unless express consent is obtained from data subjects. Once again, the Respondent did not provide proof that they obtained express consent from the Complainant's to use their images in their in-store branding.

39. In this regard, this Office finds that the Complainants' rights were violated in terms using of their images by the Respondent without express consent.

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

40. 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.

41. Section 65 of the Act provides for compensation to a data subject and states 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. Section 65 (4) of the Act states that **"damage" includes financial loss and damage not involving financial loss, including distress.**"*

Further, Regulation 14 (3) (e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

42. The Complainants sought compensation of Kshs. 6,300,000 cumulatively as indicated in paragraph 18 of this determination.

43. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainants' images were used by the Respondent in their in-store branding for commercial purposes without obtaining express consent from the Complainants.

44. This Office also considered the fact that the alleged contract was never adduced hence the duration of infringement could not be ascertained.

45. This Office therefore makes an order for compensation of **Kenya Shillings Five Hundred Thousand Shillings (Kshs. 500,000)** payable by the Respondent to each Complainant for use of their images for commercial purposes without consent. For the avoidance of doubt the compensation award is as follows;

- i. Winnie Wanja- **Kenya Shillings Five Hundred Thousand Shillings (Kshs. 500,000).**
- ii. Annah Mburu- **Kenya Shillings Five Hundred Thousand Shillings (Kshs. 500,000).**
- iii. Wendy Mwatha- **Kenya Shillings Five Hundred Thousand Shillings (Kshs. 500,000).**

46. The total amount of compensation will therefore be **Kenya Shillings One Million, Five Hundred Thousand Shillings (Kshs. 1,500,000).**

47. Based on Regulation 14 (2) (e), the Respondent is directed to ensure that all data subjects are notified that their personal data is being collected and that they obtain express consent for use of personal data and more importantly, use of personal data for commercial purposes.

H. FINAL DETERMINATION

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

- i. The Respondent is found liable for commercial use of the Complainants' personal data without express consent;
- ii. The Respondent is hereby ordered to compensate the Complainants' **Kenya Shillings One Million Five Hundred Thousand Shillings (Kshs. 1,500,000)**; and
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 22nd day of April 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

KENYA

