



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0280 OF 2024

N**O***.....COMPLAINANT**

-VERSUS-

MALIBU PHARMACY.....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 against the Respondent alleging that she had ordered prescription medicine from the Respondent which was delivered to her with her name, number, house location, type of prescription and wrong diagnosis tagged on the outside of the package and that the said personal data was shared with third parties without her knowledge and 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 (hereinafter 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 12th February 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 29th February 2024 referenced ODPC/CONF/1/5 VOL 1 (847). 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, among other things, 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 process the complainant's personal data;
 - d. Evidence to weather the complainant consented to the processing of their personal data; and

e. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint do not take again.

8. The Respondent responded to the allegations *vide* letter dated 20th March 2024.

D. NATURE OF THE COMPLAINT

i. THE COMPLAINANTS' CASE

9. The Complainant alleged that the Respondent, a pharmacy, took it upon itself to diagnose her without her knowledge or without consulting her primary doctor. Further, she contends that the diagnosis itself is defamatory, wrong, misleading and was carried around by a rider all day long as he delivered medication to various clients.
10. The Complainant additionally observes that the incorrect diagnosis included her complete name, phone number, and home address, and that the diagnosis document was attached to the outside of the package containing her medication, where anyone could view it. She further claims that the rider is not a medical professional, and she is unsure how many persons saw the information from the pharmacy until the drug arrived at her residence.
11. Additionally, the Complainant submits that the medical insurance form that accompanied the medication also had a wrong and misleading diagnosis again written by the Respondent. This was again carried by the same rider and therefore had her personal medical information exposed in a very public way.
12. The Complainant further states that when she received the medication, she raised a concern with one of the Respondent's doctors about the wrong diagnosis on top of the package and on the medical insurance form. That despite raising this issue and getting assurance that the doctor will do everything on his end to rectify the situation, the insurance medical claim form was still scanned and sent to the insurance company with the erroneous information.

ii. THE RESPONDENT'S RESPONSE

13. The Respondent states that the Complainant was their valued client for over two years and during this time they have been responsible for managing her

prescriptions as well as those of her family members. According to the Respondent, the deliveries have been made to her residence using riders employed directly by the Respondent.

14. The Respondent posits that on 19th January 2024, the Complainant placed an order with one of the Respondent's branch WhatsApp number, requesting delivery to her residence and providing location details. Their pharmacist handled the prescription, which was then passed to their rider for direct delivery to the Complainant using the Respondent's pharmacy-provided motorbike in a sealed container and the package was received directly by the Complainant at her residence.
15. According to the Respondent, in order to facilitate insurance reimbursement, the prescription, invoice, and insurance claim form were forwarded to Cigna for review, processing, and payment of the medications supplied.
16. It is the Respondent's position that the Complainant's personal information was not exposed to multiple third parties, as alleged. The information was solely utilized for processing her prescription, arranging delivery to her address, and initiating the insurance reimbursement process.
17. The Respondent further stated that the claimant's personal information was never utilized for promotional purpose and that she exclusively received information from them during the processing of her orders, through calls and WhatsApp messages.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

18. To support her complaint, the Complainant produced pictures of how the medical package sent to her appeared; screenshot pictures of conversations between the Complainant and the Respondent's employees; and the Respondent's settlement note sent to the insurance company.

II. THE RESPONDENT'S EVIDENCE

19. Apart from the response to the notification letter, the Respondent did not adduce any other evidence.

F. ISSUES FOR DETERMINATION

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

- i. Whether the Complainant's Health data was processed as per the Act; and
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE COMPLAINANT'S HEALTH DATA WAS PROCESSED AS PER THE LAW.

21. The complaint herein relates to the processing of personal data wherein the Complainant alleges that her health data was not processed as per the law while the Respondent counters the allegations by submitting that it processed the Complainant's health data as per the law and through the Company's channels. The Respondent submitted that no third party was involved in the process of delivery of the drugs to the Complainant. All those involved were the Respondent's employees.

22. The Complainant contended that the Respondent took upon itself to diagnose her without her knowledge and or without consulting her primary doctor and that the diagnosis itself was very wrong, defamatory, and misleading. She further said that the wrong diagnosis had her full name, number, and location of her house.

23. The Complainant further contended that the paper that had the wrong diagnosis was attached on the outside of the package that had her medication and that anyone could see the information.

24. The Complainant further contended that the Respondent also wrote a wrong and misleading diagnosis on the medical insurance form that accompanied the medication.

25. Section 2 of the Act defines **health data** to mean data related to the state of physical or mental health of the data subject and includes records regarding the



past, present, or future state of the health, data collected in the course of registration for, or provision of health services, or data which associates the data subject to the provision of specific health services. The same section further defines processing to mean any operation or sets of operations which is performed on personal data or on sets of personal data whether or not by automated means.

26. Section 2 of the Act, further defines sensitive personal data to mean data revealing the natural person's race, health status, ethnic social origin, genetic data, biometric data, property details, etc.

27. Section 25 of the Act provides for principles of data protection. It provides:

"25. Principles of data protection

Every data controller or data processor shall ensure that personal data is-

(a) processed in accordance with the right to privacy of the data subject;

(b) processed lawfully, fairly, and in a transparent manner in relation to any data subject;

(c) collected for explicit, specified, and legitimate purposes and not further processed in a manner incompatible with those purposes;

(d) adequate, relevant, limited to what is necessary in relation to the purposes for which it is processed;

(e) collected only where a valid explanation is provided whenever information relating to family or private affairs is required;

(f) accurate and, where necessary, kept up to date, with every reasonable step being taken to ensure that any inaccurate personal data is erased or rectified without delay;

(g) kept in a form which identifies the data subjects for no longer than is necessary for the purposes which it was collected; and

(h) not transferred outside Kenya, unless there is proof of adequate data protection safeguards or consent from the data subject. (Emphasis ours)

28. Section 44 of the Act provides for the processing of sensitive personal data. It states that no category of sensitive personal data shall be processed unless Section 25 applies to the processing.

29. Section 46 (1) of the Act specifically provides for personal data relating to health. It provides that personal data relating to the health of a data subject may only be processed:-
- a) By or under the responsibility of a health care provider; or
 - b) By a person subject to the obligation of professional secrecy under any law.
30. From the above provisions of the law and in light of the complaint, it is evident that at all material times when the Respondent's employees were attending to the Complainant's medical requests they were processing the Complainant's health data which is sensitive personal data.
31. In light of Section 44 above, the Respondent was required to process the Complainant's data in accordance with Section 25 of the Act. Specifically, they were mandated to process the same lawfully and in a manner that upholds the privacy of the Complainant and more specifically her health data.
32. From this Office's investigations and the evidence adduced, it is evident that a tag containing the Complainant's name, phone number, physical address and a medical diagnosis were placed on top of the package delivered to the Complainant.
33. The circumstances surrounding the complaint are that of the Complainant requesting for medication remotely within the confines of her home from the Respondent and the Respondent delivering the same to the Complainant. This then begs the question, whether all the information tagged on top of the package necessary for purposes of delivering the medication to the Complainant in such circumstances.
34. Concerning the name, phone number, and location of the Complainant – this information was necessary for the circumstances to facilitate delivery of the medical package to the Complainant. The medical package could not be delivered to the Complainant without this information. The necessity of the disclosure of the above information (name, phone number, and location) was affirmed by the Complainant herself when she stated that it was not her first-time ordering medicine from the Respondent. She had ordered several times and in all those

times the package only contained the name, phone number and location which were necessary for tracing and delivery of the same.

35. However, the Office finds that the information containing the Complainant's medical diagnosis being exposed in the manner stated hereinbefore violated the Complainant's right to privacy under Section 25(a) of the Act.

36. Further, the medical diagnosis was not necessary in relation to the purposes of delivery of the medication to the Complainant, thereby violating the principle of data minimization espoused in Section 25 (d) of the Act.

37. As such the Office finds that the Respondent violated Sections 25(a) & (d) as read with Section 44 of the Act to the extent that it did not conceal the Complainant's diagnosis while delivering the medical package to her. It also abrogated its responsibility over the Complainant's health data as envisioned under Section 46 of the Act.

38. Concerning the medication package being exposed to other third parties by the Respondent we note that after the Respondent's pharmacist handled the Complainant's prescription it was then given to a rider for direct delivery to the Complainant as she had intended it to be delivered. No evidence has been availed to this Office to support the allegation that the same was handled by any third parties.

39. This Office will not delve into the issue of the alleged wrongful diagnosis of the Complainant's medical condition by the Respondent as no evidence was adduced to show that the diagnosis was altered. In as much as the Complainant produced the filled insurance form showing the alleged altered diagnosis by the Respondent, the Complainant did not produce the supposedly correct diagnosis and prescription from her primary doctor. As such this Office can not ascertain the Complainant's allegations.

40. Concerning the alleged wrongful information also being shared with the insurance company, we note that the purpose of sharing the same was for the Respondent to claim payment for the prescriptions and nothing else. The insurance form had

to be filled out for the Respondent to claim payment for the medicines supplied to the Complainant. As such there was a lawful basis for sharing the complainant's data with the health insurance company.

41. This Office will now turn to the issue of whether the Complainant is entitled to any remedies under the Act and the attendant regulations.

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

42. Under 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.

43. Having considered the merits of the Complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent did not process the Complainant's health data per the law, it, therefore, follows that there has been a violation of the Act by the Respondent. The Respondent did not process the Complainant's personal data in accordance with Sections 25(a) and 25(d) of the Act.

44. Section 65 (1) 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.

45. Regulation 14 (3) (e) of the Enforcement Regulations further provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

46. The Complainant claimed for remedy against the Respondent. The Respondent did not make any representations concerning the Complainant's claim. Having found that the Respondent and or, its employees processed the Complainant's health data unlawfully, the Respondent is hereby directed to compensate the



Complainant the amount of **Kshs. 700,000/= (Seven Hundred Thousand Shillings Only)** for **unlawful processing of the Complainant's health data.**

As noted earlier in this determination health data entails sensitive data. The same ought to be handled with a high degree of confidentiality as the potential for misuse of health data is very high in the wrong hands. In the circumstances surrounding this complaint, the Respondent acted negligently by not concealing the Complainant's diagnosis.

47. The Office further notes that Section 58 of the Act as read together with Regulations 14 and 16 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 further contemplates, as a remedy, the issuance of enforcement notices against an entity that has failed or is failing to comply with any provisions of the Act and the attendant regulations thereto. On that note, we are guided accordingly and an Enforcement Notice hereby ensues as against the Respondent.

G. FINAL DETERMINATION

48. In the ultimate, the Data Commissioner therefore makes the following final determination;

- i. The Respondent is hereby found liable for unlawfully processing the Complainant's personal data relating to health.
- ii. The Respondent is ordered to Compensate the Complainant **KES 700,000/= (Seven Hundred Thousand Kenya Shillings Only)** for the unlawful processing of the Complainant's health data.
- iii. An Enforcement Notice be and is hereby issued against the Respondent.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 11th day of May 2024.


IMMACULATE KASSAIT, MBS
DATA COMMISSIONER