



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 289 OF 2024**

**DENNIS GITONGA NDURURI.....COMPLAINANT**

**-VERSUS-**

**TWIGA FOODS LIMITED.....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 filed a complaint on 14<sup>th</sup> February 2024 alleging that his image was used for commercial purposes on a worldwide scale without obtaining his consent or providing compensation.

**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 as '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 as '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 14<sup>th</sup> February, 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by the Complainant who was an 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 5<sup>th</sup> March 2024 and referenced ODPC/CONF/1/5 VOL 1(843). In the notification of the complaint, the Respondent was informed that if the allegations by the Complainant were true, it was in violation of various provisions of the Act. Further, the Respondent was requested to provide this Office with the following:
  - a. A response to the allegations made against it by the Complainant;
  - b. Any relevant materials or evidence in support of the response;
  - c. Proof of consent from the Complainant to use his image;
  - d. The legal basis relied upon to process and engage with the Complainant's personal data;

- 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 does not take place again; and
  - f. Any other relevant information it wishes the Office to consider.
8. The Respondent responded to the Notification of Complaint letter *vide* a letter dated 3<sup>rd</sup> April, 2024.
  9. The Office on 19<sup>th</sup> April 2024 forwarded the Respondent's response to the Complainant and invited the Complainant to file a rejoinder to the same. The Complainant opted not to file a rejoinder to the Respondent's response.
  10. This determination is therefore as a result of analysis of the complaint as received, the response by the Respondent and investigations conducted by the Office.

#### **D. NATURE OF THE COMPLAINT**

11. The Complainant alleged that his image was used for commercial purposes on a worldwide scale and for profit without obtaining his consent or providing compensation.
12. This is a redlodged complaint as the initial complaint, ODPC Complaint No. 2395 of 2023, lodged on 17<sup>th</sup> November 2023, was withdrawn by the Complainant.

#### **E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED**

##### **i. THE COMPLAINANT'S CASE**

13. The Complainant stated that during the assessment and mitigation of risks posed by breach of the Complainant's privacy by the Respondent, he discovered that the said breach was in pursuit of a worldwide commercial venture by IBM research and the Respondent. Further, he stated that the above facts will be demonstrated by 88 online articles and social media platforms. The Complainant provided links to the 88 online articles as proof of the same.
14. The Complainant alleged that sometime in 2017, the Respondent entered into a joint study agreement with International Business Machines Corporation (hereinafter as 'IBM') for a term of one year.

15. Under the agreement, parties collaborated on a joint study research solely for the development of a financial platform prototype of a retail finance system.
16. The Respondent and IBM agreed to publish the findings of the study in as many scientific journals and periodicals. They agreed to publish photos of employees of the Respondent in their normal operations to develop and promote the product. This was done without consent or consultation on the part of the Complainant.
17. In pursuit of this research IBM and the Respondent jointly uploaded photos of all employees on a platform known as IBM Flickr account. That the IBM Flickr account being a public account, anybody with internet could access them and anybody accessing the IBM Flickr account could see pictures of the Respondent's employees while at work. The Complainant was one of the employees whose photos were submitted to the IBM research Flickr account.
18. The Complainant stated that his image generated the most traffic compared to other articles where the Respondent's employees appeared. Due to this fact, the image was used in at least 100 online articles worldwide.
19. The Complainant alleged that the Respondent and IBM did not obtain his express consent and did not inform him of such use when they were collecting the data. This was necessary especially since they had knowledge that the images would be used worldwide.
20. Further, after collecting the images, the Respondent and IBM did not anonymize the data in such a manner as to ensure that the Complainant was no longer identifiable.
21. In explaining how the prototype financial service being developed for the Respondent and IBM works, I\*\*\*\* M\*\*\*\*\*, a researcher on the inclusive financial services group at IBM Research in Kenya, said that "After analyzing purchase records from a mobile device, we used machine learning algorithms to predict creditworthiness, in turn giving lenders the confidence they need to provide microloans to small businesses. Once the credit score is determined, we use a blockchain, based on the Hyperledger Fabric, to manage the entire

lending process from application to receiving offers to accepting the terms of repayment.” The Complainant provided a link to the said video posted on YouTube as proof.

22. The Complainant averred that the reason why the images were taken was purposely to promote and advertise the Respondent’s proposed joint venture as seen from the above explanation on paragraph 21. The project was widely covered by investment and technology reporters to an extent that it has more than one billion views online all of which depict the Complainant as a brand ambassador for the Respondent. The product was brought to life using the Complainant’s bio data and the bio data of other employees. It is unknown the extent to which this data was used.
23. The Complainant stated that anyone conducting their research on the Respondent would not hesitate to conclude that he is and was still an employee or an ambassador of the Respondent based on the numerous articles he appears in. An article published by IBM depicts the Complainant as their brand ambassador.
24. The Respondent has since become one of the most heavily funded startups in the world but the Complainant got no benefit from his image being used as an ambassador of the Company.
25. The Respondent is the same employer who fired the Complainant without giving him a reason for termination of contract, or a notice of termination or even a fair hearing as per the labour laws. The Complainant is of the opinion that this practice by the Respondent and IBM not only amounts to unjust enrichment but also is analogous to slavery for using his image and his labour without pay and or compensation and for their material gain.
26. The Complainant avers that due to the said leakage, he has lost his image rights and has also lost control over and lost value of his personal image since it is accessible to anybody with an internet connection and such of less value commercially.

27. The Complainant avers that he may have lost job opportunities from other employers as a result of his image being portrayed as a brand ambassador of the Respondent.

28. The Complainant avers that the leakage of his image coupled with being depicted as an ambassador of the Respondent poses a possible security risk including but not limited to possible identity theft.

29. The Complainant produced the following documents as evidence to be used in support of his Complaint:

- a) Complaint form and the Complainant's statement;
- b) List of Respondents;
- c) Links to different articles where the Complainant is being used to advertise Twiga Foods Limited products and Services;
- d) CNN Advertisement feature sponsored by IBM and Twiga Foods Limited;
- e) Online global articles in at least 10 different languages wherein the Complainant appears (as per Google image search);
- f) A TikTok Video;
- g) Complainant's identity card;
- h) Demand letter to the Respondent; and
- i) A certificate of electronic evidence.

30. The Complainant sought the following remedies:

- a) A finding that the Respondents have breached the Complainant's privacy by using his data/image without consent;
- b) General damages for pain and suffering resulting from the negligent breach of privacy by the Respondents;
- c) Compensation for the implied ambassadorial contract between the Complainant and the Respondent from 2018 to date of judgment commensurate to the income generated from the joint venture;
- d) General damages for loss of image rights;
- e) General damages for breach of privacy;
- f) General damages for exposing the Complainant to possible identity theft;

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- g) Special damages of Kshs. 10 million for image cleanup and mitigation of possible risk of identity theft.
- h) Compensation for exposing the Complainant to slave like practices emanating from the use of his image without consent and or compensation.
- i) Compensation for exposing the Complainant to loss of human dignity emanating from the use of his image without consent and or compensation.
- j) An order compelling the Respondents to delete and or erase any and all images and or videos from their or their agents' websites and or social media pages where the Complainant appears without his consent;
- k) An award of exemplary and aggravated damages for the unauthorized use of the Complainant's image without consent or compensation and for commercial purposes by the Respondents;
- l) Salary from July 2018 to date of judgment for wrongly depicting the Complainant as an employee of the Respondents;
- m) An order for the Respondent to publish a clarification in at least two local dailies clarifying that the Complainant was not an employee and or an ambassador of the Respondent for the period July 2018 to date.
- n) An order for all the Respondents to publish at least 2 articles in their official websites clarifying that the Complainant was not an employee and or an ambassador of the Respondent for the period July 2018 to date; and
- o) Costs to be provided for.

## **ii. THE RESPONDENT'S RESPONSE**

31. The Respondent stated that it shall rely on the Replying Affidavit sworn by Ms. Beatrice Maiyo on 2<sup>nd</sup> February 2024 and the Supplementary Affidavit sworn by the said Ms. Maiyo on 3<sup>rd</sup> April 2024.

32. The Respondent in its replying affidavit dated 2<sup>nd</sup> February 2024 stated that the Complainant was an employee of the Respondent between 1<sup>st</sup> April 2018 and 31<sup>st</sup> July 2018 wherein he served as a sales representative based in Nairobi

West, Nairobi County. The Respondent produced a copy of the Complainant's Employment Contract as proof.

33. The Respondent stated that the Complainant was summarily dismissed by the Respondent on 26<sup>th</sup> July 2018 on grounds of gross misconduct. It produced a copy of the termination letter as proof.
34. In August 2017, the Respondent and the International Business Machines Corporation (IBM) agreed to participate in a joint study in which the parties collaborated on research regarding a retail finance platform prototype. The joint study was for a term of one year beginning 21<sup>st</sup> August 2017 and ending 20<sup>th</sup> August 2018. Parties agreed to publish the results of the joint study in scientific journals or periodicals.
35. The Respondent stated that the photograph that is the subject of this dispute was taken on 12<sup>th</sup> April 2018 while the Complainant was an employee of the Respondent in the course of his work. Before the photograph was taken, the Complainant was fully informed by the Respondent's representatives that his photograph would be taken and published as part of the joint study between the Respondent and IBM, an action which the Complainant voluntarily consented to.
36. As a result of the agreement and the subsequent study, the photograph of the Complainant engaged in his daily work was uploaded onto the IBM Research's Flickr account on 15<sup>th</sup> April 2018. IBM Research's Flickr account is a publicly accessible platform.
37. The Respondent and IBM shared information in furtherance of a joint study regarding retail finance platform prototypes. The data was only used for the purpose of research. The Respondent avers that it has neither used the photograph of the Complainant for marketing purposes nor for the advertisement of its business.
38. The only third party with whom the Respondent shared the Complainant's photograph was IBM for purposes of the joint study as highlighted above. At

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no point in time did the Respondent supply the Complainant's photograph to any other third party.

39. The Respondent stated that it only became aware of the disputed use of the Complainant's photograph on 19<sup>th</sup> December 2023 when it received a letter from the ODPC notifying it of the complaint. The Respondent avers that it has never been served with or received the demand letter dated 18<sup>th</sup> June 2023 from the firm of Munene Njuguna & Company Advocates, until it was served with the Complaint by the ODPC on 19<sup>th</sup> December 2023.
40. Further, at no material date before this complaint had the Complainant communicated with the Respondent stating that the photograph violated his rights under the Data Protection Act, 2019 or seeking to exercise his right of rectification and erasure pursuant to Section 40 of the Act and Regulation 12 of the Data Protection (General) Regulations, 2021.
41. To demonstrate good faith on the part of the Respondent, since the notification of the complaint was received, the Respondent has, without being prompted, taken positive measures to contact IBM to pull down the photograph from the IBM Research Flickr account. IBM has deleted the photographs taken for the purposes of the joint study. The IBM Research Flickr account in which the Complainant's photograph was posted has since been taken down and can no longer be accessed by the public. The Respondent provided a screenshot of the IBM Research Flickr account showing that the photograph has been erased and is inaccessible on the account.
42. Had the Complainant reached out to the Respondent in exercise of his right of rectification and erasure, the Respondent would have promptly considered his request and arranged for his photograph to be erased and pulled down from the IBM Research Flickr account as was done upon receipt of the Complaint lodged with the ODPC.
43. The Respondent stated that it did not authorize the publishing of the article published by Fuzu Limited in July 2022. The article credited the source of the Complainant's image to the IBM Research's Flickr account. The photograph no

longer appears in the 2<sup>nd</sup> Respondent's article following the erasure of the photograph on IBM Research's Flickr account.

44. It is the Respondent's belief that the same photograph was utilised in the TikTok video subject of this dispute, although the Respondent did not authorize the use of the photograph or the TikTok video in question.

45. While the Complainant's photograph was uploaded on IBM Research's Flickr account on 15<sup>th</sup> April 2018, the Complaint was lodged in December 2023. The two timelines being approximately four and a half years apart. This fact raises questions about the genuineness of the grievance raised by the Complainant and whether it was an afterthought following the enactment of the Data protection Act, 2019.

46. The Respondent reiterates that it did not and has not shared the Complainant's photograph with any third parties apart from IBM which was done as part of the joint study carried out in 2017 and 2018 with the consent of the Complainant.

47. The data in dispute was collected in April 2018, before the enactment of the Data Protection Act, 2019 and the subsidiary rules which now govern the collection, handling and processing of personal data. The Respondent could not reasonably be expected to have followed the strict legal procedure prescribed in the Act and rules that was in-existent at the time, when taking the Complainant's photograph for use in the joint study with IBM.

48. The Respondent stated that the Complainant did not present a legitimate data protection complaint. The complaint is not one that seeks for redress of a breach of rights as set out under the Data Protection Act, 2019 but rather as an attempt by the Complainant to solely seek financial gain from the Respondent under the threat of punitive action by the ODPC. This is despite the Respondent taking all reasonable steps to address the complaint to the satisfaction of the Complainant.

49. The Respondent in its supplementary affidavit dated 3<sup>rd</sup> April 2024 and in response to the reinstated complaint stated it finds it concerning that the

Complainant sought to withdraw the initial complaint in the guise that he had discovered new grounds in support of his complaint whereas the correct position is that the Complainant callously wanted to rely on the confidential discussions held between the parties in good faith during the ODPC facilitated mediation which commenced on 23<sup>rd</sup> January 2023 and terminated on 30<sup>th</sup> January 2024 without a mutually agreed settlement.

50. The Respondent denied the averments made in paragraphs 5-21 of the reinstated complaint which have been summarized in paragraphs 16-28 of this determination.
51. The Respondent stated that it did not in any way or form authorize the publishing of the Complainant's image or sanction the use thereof without the Complainant's consent, by any of the Respondent's other than IBM. In as much as this is claimed, it placed the Complainant to strict proof thereof.
52. The Respondent stated that the reinstated complaint fails to particularise, to any degree of specificity; the harm occasioned on the Complainant by publication of the disputed photograph. No evidence has been placed before this Office to enable it assess damages.
53. The Respondent stated that paragraph 16 of the reinstated complaint should be disregarded as it invites this Office to adjudicate or consider employment disputes which are matters beyond the mandate of the ODPC.
54. The Respondent stated that the Complainant has not stated with any precision the security risks, including identity theft, that he has been made vulnerable to.
55. It is absurd that the Complainant would state that the wide propagation of his photograph online poses a risk of identity theft to his person then go ahead to seek prayers that compel all 22 Respondents in the reinstated complaint to publish his photograph and biodata globally.
56. The Respondent stated that the Complainant has also sought reliefs such as an award of salary arrears, publication of clarification articles, award of unsubstantiated special damages, general, exemplary, and aggravated damages, and costs of the reinstated complaint. All these reliefs are outside

the jurisdiction of the ODPC and the scope of remedies awardable under the Act. The Respondent urged this Office to reject these reliefs in their entirety as they are not only unjustified but also outside the scope of remedies awardable by this Office.

57. The Respondent stated the complaint ought to be dismissed for the following reasons:

- a) The Complainant has egregiously exploited the ODPC facilitated mediation process and relied on confidential information disclosed in the mediation to lodge the reinstated complaint in the guise of obtaining new evidence which the Complainant did not have while instituting the initial complaint which he withdrew on 7<sup>th</sup> February 2024;
- b) The Complainant has failed to disclose that before the disputed photograph was taken on 12<sup>th</sup> April 2018, the Complainant was fully informed by the Respondent's representatives that his photograph would be taken and published as part of the joint study between the Respondent and IBM, an action which the Complainant voluntarily consented to;
- c) While the cause of action arose in April 2018 before the Data Protection Act, 2019 came into force, the Complainant has never raised an objection to publication of his photograph and only bid his time and filed the Complaint in 2023;
- d) The Complainant deliberately failed to exercise his right of rectification and erasure pursuant to Section 40 of the Data Protection Act, 2019 and Regulation 12 of the Data Protection (General) Regulations, 2021 between the time the cause of action arose and when the complaint was filed;
- e) The Complainant failed to notify the Respondent or serve a demand upon the Respondent before institution of the complaint; and
- f) The Respondent has acted in good faith since receiving the notification of the initial complaint by taking positive measures to contact IBM to pull

down the photograph from the IBM Research Flickr account to ensure that it can no longer be accessed by the public.

58. Further, and to demonstrate good faith, the Respondent has actively contacted domain owners featuring the Complainant's image requesting that the said image be pulled down. As a result of these efforts, the Complainant's image has been removed from multiple domains and is now inaccessible. The Respondent provided copies of the correspondence between itself and the third parties seeking for and evidencing the removal of the Complainant's picture from their domains.

#### **F. INVESTIGATIONS UNDERTAKEN**

59. The Office visited the various websites where the Complainant's image was allegedly published by clicking on the links provided by the Complainant.

60. As of the time of lodging this complaint, investigations conducted revealed that the images posted on the IBM Research Flickr account and Fuzu Limited websites were no longer available for viewing.

61. Further, the Office observes that the Respondent had already informed the other third parties via email to pull down the image.

#### **G. ISSUES FOR DETERMINATION**

62. The following issues fall for determination by this Office:

- i. Whether the Demand letter dated 18<sup>th</sup> June 2023 was served upon the Respondent;
- ii. Whether there was an infringement of the Complainant's rights under the Act; and
- iii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

**I. WHETHER THE DEMAND LETTER DATED 18<sup>TH</sup> JUNE 2023 WAS SERVED UPON THE RESPONDENT**

63. The Complainant alleged that he sent a demand letter dated 18<sup>th</sup> June 2023 to the Respondent through the firm of Munene Njuguna & Company Advocates. The Complainant provided a copy of the said demand letter as proof of the same.

64. The Respondent on the other hand alleged that the Complainant failed to notify them or serve a demand upon them before the institution of the complaint.

65. A cursory perusal of the demand letter does not reveal a stamp or signature of an authorized representative of the Respondent thereby indicating that the demand letter was not physically served upon the Respondent.

66. A perusal of the recipient's address on the said demand letter indicates that the Complainant may have sent the demand by either email or WhatsApp, as the Respondent's alleged email address and contact number are indicated on the demand letter.

67. Service by email, WhatsApp and physical service are all proper ways of service provided for under the Civil Procedure Rules. The issue herein is whether proper service was effected.

68. The Respondent's assertion of non-service of the demand letter was not rebutted by Complainant.

69. The Complainant did not provide any evidence of service of the demand letter. If indeed it was served by email, the Complainant should have attached a screenshot of the email or a delivery report as evidence of service of the demand. The Complainant also did not attach a WhatsApp screenshot to prove that it served the demand via WhatsApp on the mobile phone number +254 (0) 709\*\*\* \*00.

70. In the absence of any evidence of service of the demand, this Office finds that the Complainant did not serve the demand letter upon the Respondent.

## II. WHETHER THERE WAS AN INFRINGEMENT OF THE COMPLAINANT'S RIGHTS UNDER THE ACT

71. Section 40(1)(b) of the Act provides for the right of erasure and states, "*a data subject may request a data controller or data processor to erase or destroy without undue delay personal data that the data controller or data processor is no longer authorized to retain, irrelevant, excessive or obtained unlawfully.*"
72. The Complainant failed to provide evidence that he exercised his right of erasure. The Complainant did not provide evidence indicating that he contacted the Respondents and requested them to erase his personal data. Instead, the Respondent only became aware of the complaint when the same was lodged with this Office.
73. Upon being notified of the Complaint, the Respondent swiftly contacted IBM to erase the image from IBM Research Flickr and IBM complied by deleting the said image of the Complainant.
74. The Respondent has further contacted the domain owners featuring the Complainant's image requesting that the said image be pulled down. As a result, the Complainant's image has been removed from multiple domains.
75. This Office finds that in the absence of evidence of service of the demand letter seeking to exercise the right of erasure, the Complainant failed to exercise his right of erasure. The Complainant ought to have first contacted the Respondents and exercised his right of erasure before lodging the Complaint with this Office. It is important to note that while this Office is committed to assisting in the enforcement of rights provided for under the Act, the Office cannot directly exercise rights on behalf of a data subject.
76. From the foregoing, this Office finds that the Complainant's right of erasure was upheld by the Respondent by swiftly erasing and or requesting third parties to erase the subject images, upon being made aware of the complaint lodged by the Complainant.

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

77. 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.

78. The Office notes that the cause of action arose in the year 2018 before the enactment of the Data Protection Act, 2019 and continued through to the year 2024. The Data Protection Act, 2019 does not apply retrospectively and the Respondent was not required to comply with its provisions when it first processed the personal data of the Complainant in the year 2018. However, after 2019, the Act was applicable and it granted data subjects rights which they are at liberty to exercise.

79. The Complainant failed to exercise his rights under the Act before lodging this complaint. The Respondent upon being notified of the complaint and without undue delay pulled down the said images from its platforms and further informed the third parties that the Complainant had requested for erasure of his image from their various platforms.

80. From the foregoing, and having found that the Complainant's rights under the Act were not violated, this Office hereby dismisses this complaint as it lacks merit.

**H. FINAL DETERMINATION**

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

- i. The Complaint is hereby dismissed.
- ii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

**DATED at NAIROBI** this 13<sup>th</sup> day of May 2024.



**IMMACULATE KASSAIT, MBS**  
**DATA COMMISSIONER**