



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 299 OF 2024

BARBRA NJIRIRI.....COMPLAINANT

-VERSUS-

KEPTIS SYSTEMS.....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 Office received a complaint from the Complainant on 17th February 2024. The complaint relates to the alleged posting of a video of the Complainant, by the Respondent, on its TikTok social media platform without obtaining consent from the Complainant.

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 17th 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 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 21st March 2024 and referenced ODPC/CONF/1/5 VOL 1 (886). 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 asked 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 its response;
 - c. The legal basis relied upon to process and engage with the Complainant's personal data;

- d. Proof of consent from the Complainant to use her image on the said social media platform;
 - e. A detailed description of how it fulfills the rights of data subjects;
 - f. 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
 - g. Any other relevant information it wishes the Offices to consider.
8. The Respondent was non-responsive and did not respond to the notification of complaint filed against it. Regulation 11(2) of the Enforcement Regulations states that *"where a respondent does not take any action as contemplated in the notification of complaint, the Data Commissioner shall proceed to determine the complaint in accordance with the Act and the Enforcement Regulations."*
9. This determination is therefore as a result of analysis of the complaints as received and investigations conducted by this Office.

D. NATURE OF THE COMPLAINT

10. The complaint relates to the alleged posting of a video of the Complainant, by the Respondent, on its TikTok social media platform without her consent.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant alleged that on 16th November 2023, the Respondent posted a TikTok video featuring her on its TikTok page without her consent. Further, the Respondent refused to pull down the said post despite being requested to do so by the Complainant. The Complainant provided a link to the video posted on the Respondent's TikTok page as evidence.
12. The Respondent stated that she requested the Respondent to delete the video on call and *via* WhatsApp message. She produced a screenshot of WhatsApp messages with the Respondent as proof.

F. INVESTIGATIONS UNDERTAKEN

13. The Office visited the Respondent's TikTok page by clicking on the link provided by the Complainant.
14. As at 21st March 2024, investigations conducted by this Office revealed that the subject video was still available and accessible at the Respondent's TikTok page.
15. As at the date of this determination, investigations conducted by this Office revealed that the subject video had been deleted and was no longer available for viewing at the Respondent's TikTok page.

G. ISSUES FOR DETERMINATION

16. In light of the above, 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 Respondent fulfilled its 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

17. Section 26(a) of the Act provides for the right of a data subject to be informed of the use to which their personal data is to be put. The Complainant, in the Whatsapp messages sent to the Respondent indicated that the video was posted without her consent and permission.
18. The Respondent was non-responsive to the notification of complaint letter and therefore it did not prove that it informed the Complainant that the subject video was being taken for purposes of posting it in its TikTok social media page.
19. Section 40(1)(b) of the Act provides for the right of erasure and states that, "*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."

20. The Complainant exercised her right of erasure by requesting the Respondent to delete the subject video posted on its TikTok page but the request was not complied with. It was not until the Respondent received the notification of complaint letter from this Office that it deleted the said video posted on its TikTok page.
21. Regulation 12(3) of the Data Protection (General) Regulations, 2021 states that "*a data controller or a data processor shall respond to a request for erasure within fourteen days of the request.*" The Respondent intentionally ignored the Complainant's request and only complied with it after it received the notification of complaint letter, which was long after the 14 days provided under the above regulation had lapsed.
22. From the foregoing, this Office finds that the Complainant's right to be informed and her right of erasure were violated by the Respondent.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

23. The Respondent is a data controller within the definition of the Act and therefore has obligations pursuant to the Act.
24. Section 30 of the Act gives instances where a data controller or data processor can lawfully process personal data. It states that a data controller or data processor shall not process data unless the data subject consents to the processing for one or more specified purposes or the process is necessary for the reasons given in subsection (b).
25. Further, Section 32 of the Act places the burden of proof on the Respondent to establish that the data subject consented to the processing of their personal data for a specified purpose. The Respondent was non-responsive to the notification of complaint and therefore it did not discharge the burden of proof in establishing

that the Complainant indeed consented to having her video posted on its TikTok page.

26. Section 29 of the Act provides an obligation to data controllers or data processors of the duty to notify the data subject. Notably, the data subject has to be informed of, *inter alia*;

- i. the rights specified under Section 26;
- ii. the fact that personal data was being collected;
- iii. the purpose of collection of their personal data; and
- iv. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

The Respondent had a duty to notify the Complainant of her rights under the Act, the fact that the video was being taken for purposes of posting it on the Respondent's TikTok page, and the measures it has in place to ensure the safety of the Complainant's personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

27. From the foregoing, the Office finds that the Respondent did not fulfil the above obligations provided for under the Act.

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

28. Pursuant to Regulation 14(2) of the Enforcement Regulations, a determination shall state the remedy to which a complainant is entitled. Further, the remedies are provided for in Regulation 14(3) of the Enforcement Regulations.

29. The Complainant sought for one remedy, that is, the removal of the subject video from the Respondent's TikTok page. The Respondent has since deleted the said video from its TikTok page.

30. The Respondent is guided to put in place clear consent mechanisms and seek prior consent before publishing a data subject's image on social media. Additionally, the

Respondent should strictly adhere to the principles of data protection and put in place measures that are in line with data protection by design and by default to avoid complaints of this nature and administrative fines that are likely to be imposed upon them in the event this Office receives similar complaints.

H. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable.
- ii. An Enforcement Notice be and is hereby issued against the Respondent.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 16th day of May 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

