



**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 0264 OF 2024**

CYRUS MWANIKI NDUNGU.....COMPLAINANT

-VERSUS-

MOJA EXPRESSWAY COMPANY.....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 Respondent continued to use his image for commercial purposes almost one year after he left their organization without his 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 '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 (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 16th February 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 (3) (b) of the Enforcement Regulations from the Complainant's advocates on behalf of 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 21st February 2024 referenced ODPC/CONF/1/5 VOL 1 (823). 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 allegations made against them by the Complainant;
 - b) Any relevant materials or evidence in support of their response;
 - c) The employment contract between them and the Complainant;
 - d) The lawful basis relied upon to continue with the use of the Complainant's personal data;
 - e) Whether the Complainant consented to the further processing of their personal data;

K

- f) Details of how they ensured adherence to the limitation to retention of personal data pursuant to Section 39 of the Act;
- g) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
- h) The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again;
- i) Any other information they wished the Office to consider.

8. The Respondent filed a response to the notification of complaint on 12th April 2024.

D. NATURE OF THE COMPLAINT

9. The Complainant alleged that the Respondent illegally and unlawfully posted on their social media platform promotional videos depicting him as still working with them despite having resigned from the company almost a year prior.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANTS' CASE

- 10. The Complainant stated that he was employed by the Respondent as a toll attendant and thereafter as sales personnel on or about 5th July 2022 and that he thereafter resigned from the company on or about 17th November 2022.
- 11. The Complainant alleged that on or about 5th October 2023, the Respondent illegally and unlawfully posted on its social media platforms a video depicting him as still working with them without his knowledge or express consent.
- 12. The Complainant stated that despite issuance of demand for an explanation as to why they used his personal information and for them to formally apologise for the use of his personal data for their monetary gains, the Respondent has refused to do so.
- 13. The Complainant alleged that upon serving the Respondent with a demand through an email on 7th December 2023, they ignored and deleted the social media posts on 10th December 2023.

14. The Complainant attached a demand letter dated 7th December 2023 and a screenshot of an email to the Respondent as proof of service of the said demand letter.

15. The Complainant also provided the said videos that the Respondent posted that allegedly contained his image.

ii. THE RESPONDENT'S RESPONSE

16. The Respondent stated that indeed the Complainant was employed as a toll attendant in their sales team from 5th July 2022 to 28th November 2022 when he resigned from his employment.

17. The Respondent presented a letter dated 15th March 2024 as an initial response to the Complainant's complaint.

18. On the question of lawful basis for processing personal data of the Complainant, the Respondent relied on Section 30 (1) (b) of the Act. The Respondent stated that it did not require the Complainant's consent to process his personal data as they relied on the employment contract between themselves and the Complainant as the lawful basis for processing his personal data.

19. The Respondent stated that by virtue of being in the sales team, it was part of the Complainant's duties to explain to customers how to subscribe to Electronic Toll Collection (ETC) service and upon request by the Respondent, the Complainant voluntarily chose to make the video as it would be used by customers who would be using the Electronic Toll Collection (ETC) service.

20. On consent and express authority, the Respondent relied on Section 32 of the Act and Regulation 4 of the Data Protection (General) Regulations, 2021 ('the General Regulations') and stated that the Complainant agreed to make the video and they presented a consent form for purposes of making the video which he was to sign and return. The Respondent provided a template of the consent form presented to the Complainant.

21. The Respondent confirmed that the Complainant never returned the signed consent form despite orally consenting to make the video.

AK

22. The Respondent stated that as per Regulation 4 (2) of the General Regulations, they orally explained to the Complainant the information stipulated under Regulation 4 (1) of the General Regulations.
23. The Respondent averred that the video made was an operational video as the Complainant was employed as part of the operations team and it was not a promotional video for marketing purposes for their services.
24. The Respondent stated that it had oral consent from the Complainant for purposes of making the video which was operational in nature.
25. The Respondent also averred that once the Complainant withdrew the oral consent, they immediately deleted the video as per Regulation 4 (1) (g) of the General Regulations and thereby respecting the Complainant's right to withdraw.
26. In the response to this Office dated 12th April 2024, the Respondent's advocates reiterated most of their averments indicated in the letter dated 15th March 2024. They added that the Complainant's employment contract stated in the job description no. 4 (4) that one of his duties as an employee was "Offering Customer Service."
27. The Respondent also added that the Complainant's variation letter dated 5th October 2022 stated that the Complainant's work included, *inter alia*, "Actively taking part in promotion, issuance and installation of the On-board Unit (OBU)". The Respondent enclosed a copy of the said variation letter.
28. On the question of limitation of retention of personal data pursuant to Section 39 of the Act, the Respondent stated that it has developed a robust Data Retention Schedule for employees in which they retain personal data for purposes of employment of employees, and unless there is a hold on employee records for court cases, they retain employees' records for six (6) years.
29. The Respondent stated that for purposes of retention, they rely on the Employment Act, the Limitation of Actions Act and the Data Protection Act.
30. The Respondent indicated that they wrote to the Complainant's advocates explaining the circumstances under which the image of the Complainant was

published on social media and that they apologized for any inconvenience caused to the Complainant.

31. On measures adopted to ensure such occurrences do not occur, the Respondent indicated that where any operational images are published under a contract by an employee, they are reviewing all such contracts as well as obtaining additional written consent as best practice.

F. INVESTIGATIONS UNDERTAKEN

32. Pursuant to Regulation 13 (3) of the Enforcement Regulations, the Data Commissioner, in conducting investigations, is to be guided by the provisions of the Fair Administrative Action Act, 2015.

33. Based on the Respondent's response, it was prudent to obtain a rejoinder response from the Complainant on certain issues relevant to the investigations of this complaint.

34. The Complainant reiterated the facts stated in both his complaint to this Office and the demand letter issued to the Respondent.

35. However, he added that the Respondent's unlawful use of his image, videos and likeness to promote the purchase and usage of the OBU and elucidate to the Respondent's customers on how to install and use it amounted to using the Complainant's image and likeness unlawfully and illegally for commercial gains. The Complainant relied on the provisions of Regulation 14 of the General Regulations.

36. Further, the Complainant relied on this Office's determination *ODPC Complaint No. 1963 of 2023 Hellen Muthoni and Solpia Kenya Limited T/A Sistar Kenya, where it was stated that "With reference to Regulation 14 of the General Regulations, it is discernible that any form of influencing and/or advancing a commercial transaction whether directly or indirectly using personal data amounts to the commercial use of personal data."*

37. The Complainant stated that the promotional videos that had his image, video and likeness used in explaining to the Respondent's customers how to install and use the OBU for payment of toll fees influenced and encouraged more

customers to install and use it for payment of toll fees for use on the Nairobi Expressway. Further, more customers subscribed to the ETC and therefore the Respondent made profits at his expense.

38. The Complainant also stated that the Respondent's unauthorized use of his image, video and likeness for commercial purposes without his express consent, insinuating that it was part of the Complainant's contractual obligations was a violation of Section 35 of the Act.

39. The Complainant denied the assertion that he orally consented to the use of his personal data but refused to sign the Respondent's consent form. The Complainant relied on the case of *T.O.S. vs Maseno University & 3 others (2016) eKLR* and reiterated that the Respondent violated his right to privacy by publishing his images, videos and likeness without his express, unequivocal, free and specific consent.

40. The Complainant sought a declaration that the Respondent is liable for infringement of his rights and that the Respondent acted in contravention of Section 25 (b) of the Act, an order of an administrative fine against the Respondent for failure to admit liability, an order for compensation of a total of Kshs. 3,000,000 and any other order that the Data Commissioner deems appropriate.

G. ISSUES FOR DETERMINATION

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

- i. Whether the Respondent obtained express consent from the Complainant to further process his personal data;
- ii. Whether there was a violation of 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 RESPONDENT OBTAINED EXPRESS CONSENT FROM THE COMPLAINANT TO FURTHER PROCESS HIS PERSONAL DATA;

42. Section 30 (1) (a) of the Act provides that a data controller or data processor **shall not** process personal data unless the data subject consents to the processing for one or more specified purposes.

43. Section 32 (1) of the Act goes ahead to give 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 on the data controller or data processor.

44. The Respondent indicated that it obtained oral consent from the Complainant to publish the video containing his image and that it was part of the Complainant's duties as per his contract and the variation letter as provided. It is not in dispute that the video was shot as part of the Complainant's duties to the Respondent as his employer at the time.

45. However, once the Complainant resigned from his employment, the Respondent did not obtain further consent from the Complainant to publish the video containing the Complainant's image. Oral consent must be corroborated by other evidence especially because the Complainant had already resigned from his employment. The Office did not receive any record of consent.

46. In this regard, the Respondent failed to prove and discharge the burden under Section 32 (1) of the Act to prove that they obtained further consent from the Complainant to use his image after he left his employment with the Respondent.

47. The principles of personal data under Section 25 (c) of the Act provide 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 Respondent relied on the variation contract dated 5th October 2022 which contained the Complainant's job description, particularly "to actively take part in promotion, issuance and installation of OBUs." In this regard, the Respondent

collected the Complainant's personal data as per Section 25 (c) of the Act. However, once the Complainant resigned from his employment, the Respondent should not have further processed his personal data in a manner that was incompatible with the purpose for collection in the first place.

49. Again, to be consistent with the purpose for collection, the Respondent should have obtained further consent from the Complainant to use his image in the video in question.
50. On the issue of 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.
51. Regulation 14 (1) of the General Regulations provides 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.
52. Posting the video containing the Complainant's image to explain to customers on how to subscribe to and how install the ETC and OBU is considered as commercial use of personal data. The Respondent did not seek express consent from the Complainant after he left his employment to continue using the video containing his image.
53. Similarly, since the Respondent relies on the complainant's contract dated 15th July 2022 and the variation contract dated 5th October 2022 as proof of consent, the Office observes that upon the termination thereof, the said contracts repudiated the terms that were contained therein.

54. In addition, the sample consent form availed to this Office that is not executed by the Complainant cannot be relied on as evidence of consent in line with Section 37(1) of the Act that required express consent in such circumstances.

55. In this regard, this Office finds that the Respondent did not seek consent from the Complainant to further process his personal data after he resigned from employment.

II. WHETHER THERE WAS A VIOLATION OF COMPLAINANT'S RIGHTS UNDER THE ACT

56. Section 26 of the Act provides for the rights of a data subject under the Act. As such, the Complainant had the right to object to the processing of all or part of their personal data and to deletion of false or misleading data about him. Personal data is defined under Section 2 of the Act as any information relating to an identified or an identifiable natural person. The Complainant's image is therefore his personal data.

57. Section 40 of the Act also provides for the right of rectification and erasure and states that a data subject may request a data controller or 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.

58. Further to the above, Regulation 12 (3) of the General Regulations provides that a data controller or data processor shall respond to a request for erasure within **fourteen days** of the request.

59. The Complainant was well within his rights in requesting the Respondent to cease and desist from using his image and to immediately pull down his profile, images and videos from their database.

60. As indicated in his complaint letter, upon serving the Respondent with the demand letter through an email dated 7th December 2023, the Respondent deleted the social media posts on 10th December 2023 as he had demanded in his demand letter.

61. The Respondent therefore deleted and erased the video containing the Complainant's image within the stipulated timelines as provided in the General Regulations.

62. The Complainant did not prove to this Office that the video containing his image was posted from the time of his resignation up to when he realized that the video was posted by the Respondent on or about 5th October 2023.

63. Upon realization that the Respondent posted the said video, the Complainant exercised his right to deletion and erasure on 7th December 2023 when he wrote the demand letter to them.

64. Therefore, on the issue of the Complainant's right to deletion, the Respondent deleted the video containing the Complainant's image within the stipulated timelines in the General Regulations.

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

65. 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.

66. 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.

67. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's image was used by the Respondent after the Complainant left employment to continue to explain to its

customers regarding their ETC services hence using the video containing the Complainant's image for commercial purposes.

68. However, this Office also takes into cognizance of the duration of the personal data violation by the fact that the Respondent pulled down the said video within three days of being served the demand letter by the Complainant. The mitigation measures adopted by the Respondent have also been noted.

69. This Office therefore makes an order for compensation of **Kenya Shillings Five Hundred Thousand Shillings (Kshs. 500,000)** payable by the Respondent to the Complainant for use of his image for commercial purposes after he left employment without any legal basis.

70. Based on Regulation 14 (2) (e) of the Enforcement Regulations, the Respondent is directed to ensure that all its employees are notified that their personal data is being collected and that they establish a lawful basis for use of personal data and more importantly, a record of consent, when the use of personal data is for commercial purposes.

H. FINAL DETERMINATION

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

- i. The Respondent is found liable for use of the Complainant's personal data without express consent;
- ii. The Respondent is hereby ordered to compensate the Complainant **Kenya Shillings Five Hundred Thousand Shillings (Kshs. 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 15th day of May 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER