



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 313 OF 2024

LIZ MUTHIKE MUKUZI.....COMPLAINANT

-VERSUS-

VIDEO ONE 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 Office received a complaint from the Complainant on 20th February 2024. The complaint relates to the alleged unauthorized use and display of the Complainant’s photographic image at the Respondent’s Yaya Centre Studio.

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

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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 20th 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 28th February 2024 and referenced ODPC/CONF/1/5 VOL 1 (829). 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. Proof of willingness by the Complainant to use her image;
 - d. The legal basis relied upon to process and engage with the Complainant's personal data;

- e. Details of when it received the request from the Complainant to pull down the photograph;
 - f. A detailed description of how it fulfills the rights of a data subject;
 - g. 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
 - h. Any other relevant information it wishes the Office to consider.
8. The Respondent responded to the Notification of Complaint *vide* a letter dated 15th March 2024.
9. This determination is therefore as a result of analysis of the complaint as received, the Respondent's response and investigations conducted by this Office.

D. NATURE OF THE COMPLAINT

10. The complaint relates to the alleged illegal and unauthorized use and display of the Complainant's private, intimate and personal photographic image, for commercial purposes, by the Respondent.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant alleged that on or about 18th November 2023, it came to her knowledge that an image of herself had been illegally displayed prominently at the Respondent's premises at Yaya Centre studio at the Respondent's reception without her express or implied authorization and/or consent. She provided a photograph of the Respondent's reception area and highlighted her image as displayed there, as proof.
12. The Complainant averred that the subject image displayed her at her most vulnerable state as she was heavily expectant, and at her most private and fragile condition. Further, the action by the Respondent to illegitimately acquire, develop,

frame/mount and/or exhibit the Complainant's photograph and/or image without her consent constitutes a clear and deliberate violation of her right to privacy.

13. The Complainant averred that she has never visited the Respondent's studio for any photo sessions or otherwise.

14. The Complainant stated that the subject photograph was taken on 16th June 2020 at a different studio by the name of RoyalReel Photography by her personal photographer, one Mr. C***** N*****.

15. The Complainant further stated that she has since confirmed from the said Mr. C***** N***** that the photograph has never been shared and/or offered to the Respondent or anyone for that matter.

16. The actions by the Respondent were laced with malice and mischief with the sole intention to capitalize on the Complainant's pregnant state for its unjust enrichment to her detriment in the form of ridicule, reputation erosion and loss of business earnings.

17. The Complainant stated that she had issued demand letters to the Respondent which have not elicited any response as of the date of lodging the complaint. She provided a demand letter dated 14th December 2023 as proof.

18. The Complainant sought the following reliefs:

- a) A declaration be issued that the acquisition, development, framing/mounting and/or exhibiting of her photograph by the Respondent is unlawful, unconstitutional and a violation of her fundamental rights and freedoms under Article 31 of the Constitution; and
- b) An order that the Respondent be compelled to compensate her for the damages and loss arising from the development and displaying of her photograph without her express authority.

ii. THE RESPONDENT'S RESPONSE

19. The Respondent responded to the Complaint *vide* a letter dated 15th March, 2023, on a "Without Prejudice" basis. It should be noted that this response was pursuant to a Notification of Complaint Letter from this Office, exercising its statutory authority under Regulation 11 of the Enforcement Regulations. As such, the response cannot be deemed to have been on a "Without Prejudice" basis.
20. The Respondent stated that the subject image was not displayed maliciously as alleged. It further stated that, it is in the business of creating videos and photographs for financial gain.
21. Additionally, and as is the norm, photography studios normally have photos available on display and therefore it was not malicious to put up the Complainant's pictures. It would be inimical to the Respondent to display any such images 'maliciously' as alleged.
22. The Respondent acknowledged that it acted contrary to the provisions of the Data Protection Act by failing to seek the consent of the Complainant prior to putting up the subject image referred to herein.
23. Consequently, the Respondent has since taken sufficient action to remedy this oversight and has taken down the pictures belonging to the Complainant that were in the studio. The Respondent attached an image showing that the Complainant's photograph was pulled down as proof.
24. Additionally, the Respondent has since expressed its remorse for this action and apologized in writing to the Complainant. The Respondent attached the apology letter as proof.

F. INVESTIGATIONS UNDERTAKEN

25. On 30th April 2024, Investigation Officers from this Office visited the Respondent's studio located at Yaya Centre to confirm that the subject image had been taken down.

26. Investigations conducted on the said date revealed that the subject image had been taken down and was no longer being displayed at the Respondent's premises.

G. ISSUES FOR DETERMINATION

27. It is not in contention that the Respondent displayed the Complainant's image at its premises without obtaining her express consent.

28. 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

29. 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 Respondent did not prove that it notified or informed the Complainant that her photograph was going to be displayed at its premises, therefore violated the Complainant's right to be informed.

30. 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.*"

31. The Complainant exercised her right of erasure by writing a demand letter dated 14th December 2023 to the Respondent. The Respondent ignored the demand and did not provide any evidence of having taken down or destroyed the subject image.

32. 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 from this Office, which was long after the 14 days provided for under the above regulation had lapsed.

33. 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

34. The Respondent is a data controller within the definition of the Act and therefore has obligations pursuant to the Act.

35. The Respondent had an obligation under Section 25 of the Act to ensure that the Complainant’s personal data is, amongst others:

- i. processed in accordance with her right to privacy;
- ii. processed lawfully, fairly and in a transparent manner in relation to the Complainant;
- iii. collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes; and
- iv. collected only where a valid explanation is provided whenever information relating to private affairs is required.

36. In collecting personal data, the Respondent is mandated by Section 28(1) of the Act to collect the personal data directly from the data subject. The Complainant averred that she has never attended any photo sessions at the Respondent’s studio and that she did not consent to have her image collected and further processed by the Respondent. The Respondent collected the Complainant’s image from a third party contrary to the provisions of Section 28(1) of the Act. Section 28(2) of the Act sets out instances where personal data may be collected indirectly. The



Respondent did not demonstrate that any of the conditions set out in Section 28(2) were relevant in this matter.

37. 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. rights specified under Section 26;
- ii. the fact that personal data was being collected;
- iii. the purpose of collection of their personal data;
- 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 it had collected her image and was going to display it at its studio, and the measures it has in place to ensure safety of her personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

38. 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 processing is necessary for the reasons given in subsection (b). The Respondent admitted that it processed the Complainant's personal data without obtaining her consent.

39. Section 37(1) of the Act states 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.*" The Respondent stated that it is a photography studio that is in the business of creating videos and photographs for financial gain.

40. It therefore follows that its action of mounting and exhibiting the Complainant's photograph prominently at its reception was intended to attract customers who would in turn pay to have their photographs taken by the Respondent. The

Respondent admitted to having used the Complainant's image for commercial purposes without having sought and obtained express consent from the Complainant, therefore it did not fulfill its obligation under Section 37(1) of the Act.

41. From the foregoing, this 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.

42. 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.

43. The Complainant prayed for compensation for the damages and loss arising from the development and displaying of her photograph without her express authority.

44. Section 65 of the Act provides for compensation to data subjects 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."*

45. Section 65(4) of the Act states that, *"damage includes financial loss and damage not involving financial loss, including distress."*

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

47. In considering whether to issue compensation, this Office takes into consideration the fact that the complaint is in respect of use of personal data for commercial purposes without consent from the data subject.

48. Further, the Office considers the fact that the Respondent either intentionally or negligently violated the Complainant's right to be informed and denied her the right of erasure of her personal data by failing to take down the image when notified by the Complainant.

49. From the foregoing, the Respondent is hereby **ordered to pay the Complainant Kenya Shillings one million and fifty thousand (KES. 1,050,000)** as compensation for the violation of the Complainant's rights under the Act and for the use of the Complainant's personal data for commercial purposes without her express consent.

50. The Respondent is guided to put in place clear consent mechanisms and seek prior consent before using data subjects' images for commercial purposes. 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

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

- i. The Respondent is hereby found liable.
- ii. The Respondent is hereby ordered to pay **Kenya Shillings one million and fifty thousand (KES. 1,050,000)** as compensation to the Complainant.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 17th day of May 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER