



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 341 OF 2024

E.K.M.....COMPLAINANT

-VERSUS-

BVB LOUNGE MERU.....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 27th February 2024 alleging that the Respondent used his image for commercial purposes on its social media pages 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 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 27th 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 13th March 2024 and referenced ODPC/CONF/1/5 VOL 1(854). 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 the response;
 - c. The legal basis relied upon to store, process and engage with the Complainant's personal data;
 - d. Proof of willingness by the Complainant to post his images;

- e. Details of when it received a request from the Complainant or his advocate to pull down the subject image;
 - 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 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 complaint as received and investigations conducted by this Office.

D. NATURE OF THE COMPLAINT

10. The Complaint relates to the alleged posting of the Complainant's images on the Respondent's social media platforms without obtaining his consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant stated that on or about 2nd December 2023, he attended the Respondent's premises known as BVB Lounge in Meru to have a good time.
12. The Complainant averred that on the aforementioned date, the Respondent uploaded and posted his images on its social media platforms, namely Facebook and Instagram with aim of deriving monetary benefit from the images. The Complainant provided screenshots from the Respondent's social media pages as proof.
13. The Complainant stated that he served the Respondent with a demand letter so as to amicably resolve the dispute but his actions yielded no results. He produced a copy of the said demand dated 13th December 2023 as proof.



14. Further, the Complainant stated that he runs a business in Meru County and continues to have his clientele diverted, directly affecting his livelihood.

15. The Complainant sought the following remedies:

- a) An order compelling the Respondent to immediately withdraw all his images from all of its social media platforms and their records;
- b) General damages for breach of the right to privacy; and
- c) Special damages for KES. 1,500,000/= for loss of business.

F. INVESTIGATIONS UNDERTAKEN

16. The Office visited the Respondent's Facebook and Instagram pages to ascertain whether the subject images were posted on the Respondent's social media pages.

17. As at the time of lodging this complaint, investigations conducted by this Office revealed that the Complainant's images were available and accessible at the Respondent's Facebook and Instagram social media pages.

18. Investigations conducted after the notification of complaint letter was served upon the Respondent revealed that the Respondent had pulled down the images of the Complainant from its Instagram page, but had not pulled down the image posted on its Facebook page, which are still available and accessible on the Respondent's Facebook page as of the date of this determination.

G. ISSUES FOR DETERMINATION

19. 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

20. 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.*"

21. Further, 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.*"

22. The Complainant exercised the above right by writing a demand letter to the Respondent and filing a complaint with this Office demanding for the removal of all his images from the Respondent's Social media pages.

23. The Complainant requested the Respondent to pull down the images on or about 13th December, 2023. The Office Notified the Respondent of the complaint on 13th March, 2024. It was until this Office notified the Respondent of the Complaint that they acted upon the Complainant's request to pull down the image posted on their Instagram page. It is worth pointing out that the Respondent did not pull down the image posted on its Facebook page and the same is still available for viewing as of the date of this determination.

24. The Respondent did not prove that it had any overriding legitimate interest to continue having the Complainant's image on its Facebook page after the Complainant exercised his right of erasure.

25. From the foregoing, this Office finds that the Complainant's right of erasure was violated by the Respondent.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

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

27. Section 30 of the Act gives instances where a data controller or processor can lawfully process personal data. It states that a data controller or 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).

28. The conditions of consent are provided under Section 32 of the Act which provides that a data controller shall bear the burden of proof 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 his images posted on its social media pages.

29. 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 his rights under the Act, the fact that his photo was being taken for purposes of posting it on the Respondent's social media pages, 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.

30. 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 runs a bar and restaurant business and posted the Complainant's image with the caption, "*Drinkcember KickOff ... Friday Night Party.*" The said post was intended to attract revellers to its establishment who would in turn

buy food, drinks and other products offered by the Respondent resulting in financial gain for the Respondent.

31. The Respondent did not prove that it obtained express consent from the Complainant to use his images for commercial purposes, therefore it did not fulfil its obligation under Section 37(1) of the Act.

32. From the foregoing, this Office finds that the Respondent failed to 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.

33. 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.

34. The Complainant sought for the immediate removal of his images from the Respondent's Social media pages. His image was pulled down from the Respondent's Instagram page but not pulled down from its Facebook page. The image is still available for viewing at the Respondent's Facebook page as of the date of this determination. Having found that the Complainant's rights provided for under the Act were violated and that the Respondent did not fulfil its obligations under the Act, an Enforcement Notice shall be issued against the Respondent pursuant to Section 58 of the Act and Regulation 16 of the Enforcement Regulations.

35. The Complainant also prayed for compensation from the Respondent for infringement on his right to privacy. Further, he sought for special damages amounting to KES 1,500,000/- for loss of business.

36. Section 65 of the Act provides for compensation to data subjects and states, "*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.*"

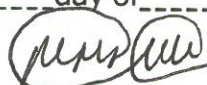
37. Section 65(4) of the Act states that, "*damage includes financial loss and damage not involving financial loss, including distress.*"

38. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
39. 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.
40. Further, the Office considers the fact that the Respondent denied the Complainant his right of erasure by failing to pull down all the images when requested by the Complainant.
41. From the foregoing, the Respondent is hereby **ordered to pay the Complainant Kenya Shillings eight hundred thousand (KES. 800,000)** 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 his express consent.
42. The prayer for special damages amounting to KES 1,500,000/- for loss of business is denied as no evidence was adduced by the Complainant to prove that he suffered the said loss.

H. FINAL DETERMINATION

43. The Data Commissioner therefore makes the following final determination;
- i. The Respondent is hereby found liable.
 - ii. An Enforcement Notice to hereby issue against the Respondent.
 - iii. The Respondent is hereby ordered **to pay Kenya Shillings Eight Hundred Thousand (KES. 800,000)** as compensation to the Complainant.
 - iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 27th day of May 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER