



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 679 OF 2024

KELVIN NYAMBANE ANGWENY.....COMPLAINANT

-VERSUS-

ELITE POWER CRAFT LIMITED

T/A AMARON BATTERIES KENYA.....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 17th May 2024 alleging that the Respondent used his photographs for commercial purposes, on its Facebook page, without obtaining 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 17th May, 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 27th May 2024 and referenced ODPC/CONF/1/5 VOL 1(978). 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 process and engage with the Complainant's personal data;
 - d. Proof of consent from the Complainant to use and publish his image on Facebook;

- e. A detailed description of how it fulfills the rights of a data subject;
 - 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 Office to consider.
8. The Respondent responded to the Notification of Complaint letter *vide* a letter dated 5th June, 2024.
9. In its response, the Respondent requested for the matter to be resolved through mediation but the Complainant was not amenable to having the dispute resolved through mediation. The Complainant instead indicated that he was amenable to negotiating with the Respondent with a view to having the matter settled.
10. The parties did not settle the matter through negotiation, hence the Office proceeded to determine the matter in accordance with the Act and the attendant Regulations.
11. 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

12. The Complainant alleged that the Respondent unlawfully used his photographs while he was their employee to advertise its products on its Facebook account without his consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

13. The Complainant alleged that on or about 21st September 2021 and on diverse dates, the Respondent used his photographs while he was their employee to advertise its products on its Facebook account under the name 'Amaron Batteries Kenya' without his consent. The Complainant provided links to the

said photographs posted on Facebook as well as screenshots of the subject photos as proof.

14. The Complainant stated that despite numerous attempts to engage the Respondent to pull down the photos, the Respondent refused to comply. In addition, the Complainant served the Respondent with a demand letter from his advocates but the Respondent has still refused to pull down the photos. The Complainant provided a demand letter dated 27th March 2024 as proof.

15. The Complainant averred that the posting of his photographs on the Respondent's Facebook page is a violation of his rights under the Data Protection Act, 2019.

16. In conclusion, the Complainant stated that he wanted to be compensated in the sum of KES 5,000,000/= for the violation of his rights and for the Office to issue an order compelling the Respondent to take down all his photographs posted on its Facebook page and on any other social media platform.

ii. THE RESPONDENT'S RESPONSE

17. The Respondent in its response stated that the Complainant was indeed their employee when the images of the team at Elite Power Craft were posted.

18. The Respondent stated that the Complainant was among other employees and the photos were not for economic gain to the company but simply to show the team that worked for the company.

19. The Respondent stated that contrary to the allegations advanced by the Complainant, the photos were posted with his full knowledge and consent and he even engaged other social media users on the comment section of the said photos. Further, the pictures were posted way back in the year 2021 and the Complainant never raised any issues during this time.

20. Additionally, the Respondent stated that the Complainant is acting in bad faith noting that at the time he left employment, he had been reported at the Industrial Area Police Station for stealing property worth KES 588,000 vide O.B No. 30/12/10/2023. However, the Office notes that the evidence with regards to the said complaint to the police was not submitted.

F. INVESTIGATIONS UNDERTAKEN

21. The Office visited the Respondent's Facebook page by the name 'Amaron Batteries Kenya' which has 4,300 followers.
22. 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 page.
23. Investigations conducted after the Notification of Complaint letter was sent to the Respondent revealed that the images were still available at the Respondent's Facebook page. As at the date of this determination, the Respondent had not pulled down the photos as requested and they were still available for viewing.

G. ISSUES FOR DETERMINATION

24. 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 obtained express consent from the Complainant to process his personal data for commercial purposes; 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

25. 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.*"
26. The Complainant exercised the above right by writing a demand letter dated 27th March 2024 to the Respondent demanding the immediate removal of his photographs from the Respondent's Facebook page. The Respondent failed to

comply with the request as the photos are still available at its page as of the date of this determination.

27. The Respondent ought to have complied with the Complainant's request within fourteen days of the request as provided for under Regulation 12(3) of the Data Protection (General) Regulations, 2021 and pulled down the subject photographs.

28. The Respondent failed to demonstrate any legitimate interest to continue having the Complainant's image on its Facebook page after the Complainant requested for the removal of the photograph.

29. From the foregoing, this Office finds that the Complainant's right of erasure of his personal data was violated by the Respondent.

II. WHETHER THE RESPONDENT OBTAINED EXPRESS CONSENT FROM THE COMPLAINANT TO PROCESS HIS PERSONAL DATA FOR COMMERCIAL PURPOSES;

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

31. 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).

32. 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.

33. The Respondent stated that the photos were posted with the Complainant's full knowledge and consent and he even engaged other social media users on the comments section of the said photos.

34. It is important to note that the Complainant and Respondent were in an employer-employee relationship, thereby making it questionable whether consent was freely given.
35. Section 37(1) of the Act provides that personal data obtained under the Act cannot be used for commercial purposes without obtaining **express consent** from the data subject.
36. 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.
37. It was upon the Respondent to demonstrate that it obtained consent from the Complainant before using his photos for marketing purposes and that the consent obtained was freely given. This burden was not discharged by the Respondent as it failed to prove that it obtained consent from the Complainant.
38. From the foregoing, this Office finds that the Respondent did not seek express consent from the Complainant for use of images for commercial purposes and therefore in that regard failed to fulfil the above obligations as set out under the Act and the attendant Regulations.

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

39. 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.
40. The Complainant sought for the removal of his photos from the Respondent's Facebook page. His photos were not pulled down and are still available for

viewing at the Respondent's Facebook page as of the date of this determination. The Respondent is hereby **ordered to erase the Complainant's photographs from its Facebook page within the next seven (7) days failure to which an enforcement notice shall issue.**

41. The Complainant also prayed for compensation from the Respondent in the sum of KES. 5,000,000/= for the violation of his rights.
42. 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.*"
43. Section 65(4) of the Act states that, "*damage includes financial loss and damage not involving financial loss, including distress.*"
44. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
45. In considering whether to issue compensation, this Office takes into consideration the fact that the complaint is in respect of the use of personal data for commercial purposes without consent from the data subject.
46. Further, the Office considers the fact that the Respondent either intentionally or negligently violated the Complainant's right of erasure of his personal data. The Respondent failed to pull down the subject photos despite the Complainant having exercised his right of erasure.
47. The Respondent is liable for using the Complainant's personal data for commercial purposes without obtaining express consent and is also liable for violating the Complainant's right of erasure. While the Office finds that the Complainant's rights were violated, it declines to award the Complainant KES. 5,000,000/= as prayed for, as the amount is so inordinately high and unjustified. The Office hereby orders the Respondent to pay the Complainant **Kenya Shillings seven hundred and fifty thousand (KES. 750,000/=)** as compensation.
48. Pursuant to Regulation 14(2)(e), this Office directs the Respondent to put in place clear consent mechanisms and seek prior consent before publishing a

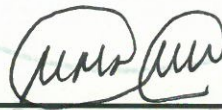
data subject's image on its social media page(s). The consent mechanism should also provide for withdrawal of consent and should be acted upon within the timelines stipulated under the Act and the Data Protection (General) Regulations, 2021.

H. FINAL DETERMINATION

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

- i. The Respondent is found liable for violating the Complainant's right of erasure and for using his personal data for commercial purposes without obtaining express consent;
- ii. The Respondent is hereby ordered **to erase the Complainant's image from its Facebook page within the next seven (7) days**, failure to which an enforcement notice shall issue;
- iii. The Respondent is hereby **ordered to pay the Complainant Kenya Shillings seven hundred and fifty thousand (KES. 750,000/=)** as compensation; and
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 14th day of August 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

