



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0386 OF 2024

LEROY KABOI.....1ST COMPLAINANT

ROSALINDA KABOI.....2ND COMPLAINANT

(LEGAL GUARDIANS OF BK MINOR)

-VERSUS-

WADI DEGLA CLUB- 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 Office received a complaint on 28th February 2024 alleging that the Respondent used the minor’s image for marketing and commercial purposes on its X (formerly known as Twitter) handles and Facebook account.

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 ‘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 (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 Complainants' advocates on 28th February 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainants on behalf of 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 15th April 2024 referenced ODPC/CONF/1/5 VOL 1 (914).
8. The Respondent responded to the said notification *via* a letter dated 8th May 2024.

D. NATURE OF THE COMPLAINT

9. The Complainants lodged the complaint through their advocates pursuant to Regulation 4 (3) of the Enforcement Regulations which state that a complaint may be lodged by a person acting on behalf of the Complainant.

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10. The Complainants alleged that the Respondent illegally and unlawfully posted on X (formerly known as Twitter) and Facebook a full-body picture of the minor playing basketball, and in particular shooting a ball.
11. The Complainants further alleged that the Respondent published pictures of the minor on its social media handles (X and Facebook accounts) without seeking consent from the minor's parents/ guardians.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

12. The Complainants stated that in October 2023, the Respondent placed an advertisement in their X and Facebook account which included a full body picture of the minor playing basketball and in particular shooting a ball. They submit that neither the minor nor his guardians had consented to his picture being used.
13. The Complainants contend that by the Respondent posting/ publishing pictures of the minor on its social media handles without seeking consent from his guardians, the Respondent violated Articles 28 & 31 of the Constitution and Sections 26, 33(1), 32(1),(37) and 43 of the Act.
14. The Complainants further submitted that the 2nd Complainant went to the Respondent's office on 10th December 2023 to try and settle the matter amicably but the Respondent refused to give her audience.
15. The Complainants further prayed for compensation.
16. To further support her complaint, the Complainant produced the impugned posts on social media pictures of the minor, and the minor's membership card to the Respondent's club
17. The Complainants made a further response dated 23rd May 2024 in response to the Respondent's response the Complainant reiterated its position that there was personal breach of the minor's data and no consent for the advertisement in the Respondent's social media sites was obtained

18. The complainant stated that the gravity of the offense was that the personal data processed belonged to a child/ minor and that the offence was committed whether they pulled down the advertisement or not.

19. The Complainant further submitted that the Respondent ended up financially benefiting from the unconsented advertisement of the child/ minor.

ii. THE RESPONDENT'S RESPONSE

20. The Respondent in its response dated 8th May 2024 stated that the complaint relates to the use of the minor's image on Instagram and Facebook posts and is not in connection with the personal data as was submitted. They further state that the data is held by the club during or for purposes of the onboarding process.

21. According to the Respondent, the minor's image as posted on Facebook and Instagram was not specifically framed on the minor's essential biometrics but it is a general depiction of a person enjoying the club facilities without specific disclosure of sensitive personal details.

22. The Respondent maintained that when the oral complaint was initially made by the legal guardians who visited the club, the posts were pulled down immediately.

23. The Respondent stated that the lawful basis it relied upon to process personal data was journalistic pursuant to the Respondent's legitimate interests of promoting its business, both covered under section 30 (b) of the Act.

24. It conceded that it did not obtain the Complainant's consent for obtaining and processing the minor's data.

25. The Respondent further stated that besides the ongoing registration process that it is undertaking, it has made immediate plans for comprehensive re-training of all staff regarding the provisions of the Data Protection Act.

26. It further submitted that the photo image was a one-off incident and not in the nature of personal data that is ordinarily collected and/ or processed by it.

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27. Additionally, it contended that the harm and damage suffered by the complainant was minimal.

F. ISSUES FOR DETERMINATION

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

- i. Whether the minor's image constituted personal data as per the Act;
- ii. Whether the Respondent obtained express consent from the Complainants to process the minor's personal data for commercial purposes;
- iii. Whether there was a violation of Minor's rights under the Act; and
- iv. Whether the Complainants are entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE MINOR'S IMAGE CONSTITUTED PERSONAL DATA AS PER THE ACT

29. In its response, the Respondent raised an issue that the minor's image did not constitute personal data as envisaged under the Act. It submitted that the complaint relates to the use of the minor's image in Instagram and Facebook posts and not in connection with the minor's personal data.

30. The Act defines personal data to mean *any information relating to an identified or identifiable natural person*. It goes further to define an identifiable natural person as a person who can be identified directly or indirectly by reference to a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social or social identity.

31. From the above definition and an examination of the picture and/or image of the minor adduced to this Office, it is evident that the minor can be personally identified physically and physiologically.

32. This Office therefore finds that as far as issue no (i) is concerned, the minor's image constituted personal data as envisaged under the Act.

II. WHETHER THE RESPONDENT OBTAINED EXPRESS CONSENT FROM THE COMPLAINANTS TO PROCESS THE MINOR'S PERSONAL DATA FOR COMMERCIAL PURPOSES.

33. The Black's Law Dictionary, 10th Edition, defines consent as "agreement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person.

34. Section 2 of the Act defines consent as any manifestation of express, unequivocal, free, specific, and informed indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data.

35. The definition of the Act details the minimum criteria of or for consent to be that it must be certain that the individual has consented, and what they have consented to. This certainty requires more than just a confirmation that they have read and understood the terms and conditions. There must be a clear signal that they agree or have agreed to the processing. The unambiguity of the consent further links in with the requirement that consent must be verifiable to the extent that one must be able to demonstrate that the data subject consented

36. 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.

37. The Act goes further to state the conditions of consent. It states as follows with regard to the conditions of consent:-

32. Conditions of consent



(1) A data controller or data processor shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose.

(2) Unless otherwise provided under this Act, a data subject shall have the right to withdraw consent at any time.

(3) the withdrawal of consent under sub-section(2) shall not affect the lawfulness of processing based on prior consent before its withdrawal.

(4) In determining whether consent was freely given, account shall be taken of whether, among others, the performance of a contract, including the provision of a service, is conditional on the consent of the processing of personal data that is not necessary for the performance of that contract. (emphasis ours)

38. Section 33 of the Act provides for processing of personal data relating to a child.

It provides that every data controller or data processor shall not process personal data relating to a child unless:

- a. Consent is given by the child's parent or guardian; and
- b. The processing is in such a manner that protects and advances the rights and best interests of the child.

39. From the evidence adduced to this Office it is evident that at all material times when the Respondent was handling the minor's data, it required the Complainants' consent. In its Response dated 8th May 2024, the Respondent conceded that it did not obtain the Complainants' consent. As such, it did not discharge its burden of proof as envisaged under Section 32 (1) of the Act..

40. 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.

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41. 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.
42. The Complainants adduced evidence to demonstrate that the Respondent used the minor's image on a sponsored Instagram post to market the Respondent. The Office is however cognizant of the fact that the Complainants were only able to demonstrate that the posts were made on Instagram and not X and Facebook as had been alleged in the complaint.
43. From the evidence adduced, it is discernible that the posts containing the minor's image were sponsored posts, advertising and/or calling upon members of the public to join the Respondent club which is a member-only club wherein the members and those intending to join, pay monetary subscriptions.
44. This Office therefore finds that as far as issue no (ii) is concerned, the Respondent did not obtain express consent from the Complainants to process the minor's personal data for the commercial purposes.

III. WHETHER THERE WAS A VIOLATION OF THE MINOR'S RIGHTS UNDER THE ACT

45. Section 27(a) of the Act provides that a right conferred on a data subject may be exercised where the data subject is a minor, by a person who has parental authority or by a guardian.
46. Section 26 (c) & (e) of the Act provides for the rights of a data subject under the Act. As such, the Complainants had the right to object to the processing of all or part of the minor's personal data and to deletion of false or misleading data about

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him. As stated earlier, personal data is defined under Section 2 of the Act as any information relating to an identified or an identifiable natural person.

47. 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.

48. 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.

49. The Complainants rightfully requested the Respondent to cease using the minor's image and to immediately pull down his images from its social media platforms.

50. Upon exercising the minor's right to erasure, the minor's image, as confirmed by both parties, was deleted and pulled down.

51. This Office therefore finds and determines that as far as issue no (iii) is concerned, the Respondent did not violate the Complainant's rights as envisaged under the Act.

IV. WHETHER THE COMPLAINANTS ARE ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS.

52. Under 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.

53. Having considered the merits of the Complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent processed the Minor's data without his guardians consent, it therefore, follows that there has been a violation of the Act by the Respondent to that extent. The

Respondent did not process the Complainant's personal data in accordance with Sections 30 (1) (a) 32 (1) and 33 of the Act.

54. Section 65 (1) 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.

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

56. The Complainants claimed for remedy against the Respondent. The Respondent contended that the award of compensation ought not to be awarded as the offending photo was pulled down.

57. Having found that the Respondent by its own admission admitted that it did not obtain consent from the Complainants, the Respondent is hereby directed to compensate the Complainant the amount of **Kshs. 700,000/= (Seven Hundred Thousand Shillings Only)** for processing of the minor's personal data for commercial purposes on the Respondent's sponsored social media post without the Complainant's express consent.

G. FINAL DETERMINATION

58. In the ultimate, the Data Commissioner therefore makes the following final determination;

- i. The Respondent is hereby found liable for use of the minor's personal data for commercial purposes without express consent.
- ii. The Respondent is ordered to Compensate the Complainants **KES 700,000/= (Seven Hundred Thousand Kenya Shillings Only)** for the unlawful processing of the Minor's personal data.

- iii. 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**



