



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 762 OF 2024

DENNIS GATHARA.....COMPLAINANT

-VERSUS-

GOODTIMES AFRICA.....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 1st June 2024 alleging that the Respondent has constantly been sending him unsolicited text messages, promoting its events, 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.

2/1

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 1st June 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 10th June 2024 and referenced ODPC/CONF/1/5 VOL 1(979). 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 send him promotional text messages;
 - 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 *via* an email dated 19th July, 2024.
9. 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

10. The Complainant alleged that he has been receiving unsolicited text messages from the Respondent, promoting its events, without obtaining his consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant alleged that the Respondent has constantly been sending him unsolicited text messages on his personal number promoting its events. He provided screenshots of the said text messages as proof.
12. Further, the Complainant stated that he did not consent to the use of his personal data for direct marketing purposes.
13. The Complainant alleged that he reached out to the Respondent through its official email requesting for the cessation of communication and deletion of his personal data but the request was neither responded to nor complied with within the requested timelines. The Complainant provided a screenshot of the said email as proof.
14. The Complainant averred that the SMSs from the Respondent did not contain an opt out mechanism as required under the Data Protection (General) Regulations.

15. Additionally, the Complainant has attempted to unsubscribe from the messages through the options provided by Safaricom PLC but the attempts have been unsuccessful. He provided screenshots as proof of the same.

16. The Complainant stated that he wanted to be awarded damages for the continued use of his personal data for direct marketing purposes without consent and that he also wanted the Office to issue an enforcement/penalty notice against the Respondent.

ii. THE RESPONDENT'S RESPONSE

17. The Respondent in its response stated that it had addressed the Complaint filed by the Complainant regarding data privacy concerns.

18. The Respondent stated that it has taken the following steps to remedy the situation: -

- i) **SMS Opt-out Feature:** It has implemented an opt-out mechanism in the SMS messages it sends out to ensure recipients can easily unsubscribe from receiving further communications.
- ii) **Terms and conditions Update:** It is in the process of updating its website's terms and conditions to explicitly outline how it collects, stores and uses data, ensuring transparency and compliance with data protection regulations.
- iii) **Click wrap agreement:** It is working with its tech team to incorporate a clickthrough feature on its website, for audiences to accept terms and conditions before purchase.

The Respondent did not submit any evidence to prove that it has implemented an SMS opt-out feature as alleged.

19. In conclusion, the Respondent stated that the above measures are part of its commitment to protecting the privacy and rights of its users and ensuring compliance with data protection laws.

F. INVESTIGATIONS UNDERTAKEN

20. The Office analysed the complaint as lodged and the Respondent's response.
21. The Office established that the Complainant indeed received promotional messages from the Respondent promoting its event dubbed Blankets & Wine.
22. The Office also established that the Respondent continued to send promotional messages to the Complainant despite the fact that he had requested them to stop sending promotional messages to him.

G. ISSUES FOR DETERMINATION

23. In light of the above, the following issues fall for determination by this Office:
 - i. Whether the Respondent fulfilled its obligations under the Act;
 - ii. Whether there was a violation of the 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 FULFILLED ITS OBLIGATIONS UNDER THE ACT

24. The Complainant alleged that he has been receiving unsolicited text messages from the Respondent, promoting its events, without obtaining his consent.
25. The Respondent did not deny the allegations levelled against it.
26. Section 30 of the Act gives instances where a data controller or processor can lawfully process personal data and 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 processing is necessary for the reasons given in subsection (b).*"
27. Section 37 of the Data Protection Act provides 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; or is authorized to do so under any written law and the data subject has been informed of such use when collecting the data from the data subject.

rk

28. Regulation 14 (1) of the Data Protection (General) Regulations 2021 (the General Regulations) further provides that for the purposes of section 37 (1) of the Act, a data controller or 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.
29. Further, Regulation 14 (2) of the General Regulations provides that a data controller or data processor is considered to use personal data to advance commercial interests where personal data is used for direct marketing through:-
- a) sending a catalogue through any medium addressed to a data subject;
 - b) displaying an advertisement on an online media site where a data subject is logged on using their personal data; or
 - c) sending an electronic message to a data subject about a sale, or other advertising material relating to a sale, using personal data provided by a data subject. [Emphasis ours]
30. By sending the promotional messages directly to the Complainant's phone number, the Respondent was involved in direct marketing as defined hereinbefore.
31. On its part, Regulation 15 of the General Regulations sets out the permitted commercial use of personal data as follows:-
- 15. Permitted commercial use of personal data*
- (1) A data controller or data processor may use personal data, other than sensitive personal data, concerning a data subject for the purpose of direct marketing where-*
- (a) the data controller or data processor has collected the personal data from the data subject;*
 - (b) a data subject is notified that direct marketing is one of the purposes for which personal data is collected;*
 - (c) the data subject has consented to the use or disclosure of the personal data for the purpose of direct marketing;*
 - (d) the data controller or data processor provides a simplified opt-out mechanism for the data subject to request not to receive direct marketing communications; or*
 - (e) the data subject has not made an opt-out request.*

NA

(2) A data controller or data processor shall not transmit, for the purposes of direct marketing, messages by any means unless the data controller or data processor indicates particulars to which a data subject may send a request to restrict such communications without incurring charges.

32. Regulation 16 of the Data Protection (General) Regulations 2021 provides as follows with respect to features of an opt-out message

16. Features of an opt out message

(1) An opt out mechanism contemplated under regulation 15 (1) (d) shall:-

- (a) have a visible, clear and easily understood explanation of how to opt out*
- (b) include a process for opting out that requires minimal time and effort;*
- (c) provide a direct and accessible communication channel;*
- (d) be free of charge or where necessary involve a nominal cost to a data subject; and*
- (e) be accessible to persons with a disability*

33. It was upon the Respondent to demonstrate that it obtained consent from the Complainant before sending marketing messages to him. This burden was not discharged by the Respondent as it failed to prove that it obtained consent from the Complainant.

34. A cursory perusal of the messages sent to the Complainant reveal that no opt out mechanism was provided for the Complainant to request not to receive the marketing messages contrary to Regulation 15(1)(d) of the Data Protection (General) Regulations, 2021.

35. From the foregoing, this Office finds that the Respondent did not fulfill its obligations under the Act.

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

36. Section 26(c) of the Act provides for the right to object to processing of personal data. The Complainant objected to the further processing of his personal data via email on 15th May 2024.

37. The right to object to processing is an **absolute right** where processing is for direct marketing purposes.
38. The Respondent ought to have complied with the Complainant's request within fourteen days of the request as provided for under Regulation 8(3) of the Data Protection (General) Regulations, 2021 and stopped processing his personal data. The Respondent intentionally and/or negligently ignored the Complainant's objection and continued sending marketing messages to the Complainant even after the 14-day period provided for under the above regulation had lapsed.
39. 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.*"
40. The Complainant exercised his right of erasure by writing an email dated 15th May 2024, to the Respondent. The Respondent did not act on the request for erasure and continued sending promotional messages to the Complainant.
41. 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 or negligently ignored the Complainant's request for erasure and continued sending marketing messages to the Complainant even after the 14-day period provided for under the above regulation had lapsed.
42. From the foregoing, this Office finds that the Complainant's right to object and his right of erasure were violated by the Respondent.

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

43. 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.

Handwritten mark

44. The Complainant in his email dated 15th May 2024, exercised his right to object to the processing of his personal data and his right of erasure of his personal data. No evidence was adduced by the Respondent to indicate that it had complied with the Complainant's requests. The Respondent is hereby **ordered to erase the Complainant's personal data from its database/records within the next fourteen (14) days and to stop sending marketing messages to the Complainant.**
45. The Complainant also prayed for damages from the Respondent for the continued use of his personal data for direct marketing purposes without consent.
46. 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.*"
47. Section 65(4) of the Act states that, "*damage includes financial loss and damage not involving financial loss, including distress.*"
48. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
49. In considering whether to issue compensation, this Office takes into consideration the fact that the Respondent processed the Complainant's personal data unlawfully.
50. Further, the Office considers the fact that the Respondent either intentionally or negligently violated the Complainant's right to object and his right of erasure of his personal data.
51. The Respondent is hereby found liable for unlawfully processing the Complainant's personal data and is also liable for violating the Complainant's right to object and his right of erasure. The Office hereby orders the Respondent to pay the Complainant **Kenya Shillings seven hundred thousand (KES. 700,000/=)** as compensation.

H. FINAL DETERMINATION

52. The Data Commissioner therefore makes the following final determination: -

- i. The Respondent is hereby found liable for violating the Complainant's right to object, right of erasure and for unlawful use of his personal data;
- ii. The Respondent is hereby **ordered to erase the Complainant's personal data from its database/records within the next fourteen (14) days and to stop sending marketing messages to the Complainant;**
- iii. An Enforcement Notice to hereby be issued to the Respondent;
- iv. The Respondent is hereby **ordered to pay the Complainant Kenya Shillings seven hundred thousand (KES. 700,000/=)** as compensation; and
- v. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 28th day of August 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

KENYA