



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 803 OF 2024**

**CATHERINE WAIRIMU GABRIEL.....COMPLAINANT**

**-VERSUS-**

**UMBA MICROFINANCE BANK.....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 7<sup>th</sup> June 2024 alleging that the Respondent sent her a direct marketing message without her knowledge or 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 7<sup>th</sup> 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 19<sup>th</sup> June 2024 and referenced ODPC/CONF/1/5 VOL II (14). 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 or the lawful basis for sending her a promotional message;
  - 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* two letters; one dated 10<sup>th</sup> July, 2024 and the other dated 18<sup>th</sup> 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 the Respondent sent her a direct marketing message without her knowledge or consent.

#### **E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED**

##### **i. THE COMPLAINANT'S CASE**

11. The Complainant alleged that the Respondent sent her a direct marketing message without her knowledge or consent. She provided a screenshot of the message as proof.
12. Further, the Complainant stated that she did not want to receive marketing messages from the Respondent as she had not directly contacted them.

##### **ii. THE RESPONDENT'S RESPONSE**

13. The Respondent acknowledged having sent a message to the Complainant on 4<sup>th</sup> June, 2024.
14. The Respondent averred that the Complainant's number is available on her public Facebook page where the Complainant operates a car hire service known as 'Rent my Ride'. The Respondent provided a link to the Facebook page and also attached a screenshot of the Facebook page as proof.
15. The Respondent stated that it firmly relies on Section 28(b) of the Act which states that personal data may be collected indirectly where the data subject has deliberately made the data public. In this case, the Complainant had

displayed her phone number publicly and the information is still publicly available as at 18<sup>th</sup> July, 2024.

16. The Respondent reiterated its respect of data subjects' rights as provided for under the Act. Additionally, it stated that the message sent to the Complainant promptly informed her why she was being contacted and prompted her to join the WhatsApp Group if she was interested in further engagement.

17. The Respondent stated that the Complainant did not take any action after receipt of the message and that it did not send her any further messages.

18. In addition, the Respondent took note of the fact that the Complainant did not want to be contacted by it and promptly deleted her information from its database and did not send her another promotional message.

19. The Respondent stated that it held a meeting with the Complainant on 15<sup>th</sup> July 2024 and agreed that it will delete her data and never contact her again. However, parties were not able to agree on the Complainant's demand for compensation.

20. The Respondent stated that it did not breach any of the rights of the Complainant.

#### **F. INVESTIGATIONS UNDERTAKEN**

21. The Office analysed the complaint as lodged and the Respondent's response.

22. The Office established that the Complainant indeed received a direct marketing message from the Respondent.

23. The Office was not able to ascertain that the Complainant's mobile phone number was publicly available at her 'Rent my Ride' Facebook page as the link provided returned the following message from Facebook, "*This content isn't available at the moment. When this happens, it's usually because the owner not only shared it with a small group of people or changed who can see it, or it's been deleted.*"

## G. ISSUES FOR DETERMINATION

24. The Complainant alleged that she received a direct marketing message from the Respondent without her knowledge or consent. On the other hand, the Respondent admitted to having sent a marketing message to the Complainant on 4<sup>th</sup> June 2024. It is therefore not in dispute that the Respondent sent a direct marketing message to the Complainant.

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

- i. Whether the Respondent fulfilled its obligations under the Act; and
- ii. 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

26. 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 –*

- a) Has **sought and obtained express consent** from a data subject; or*
- b) Is authorised 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."*

27. 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.*

28. 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.

29. By sending a marketing message to the Complainant's phone number, the Respondent was involved in direct marketing as defined above.

30. Regulation 15 of the General Regulations sets out the permitted commercial use of personal data and states that, "*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."*

31. It was upon the Respondent to demonstrate that it had collected the personal data from the data subject, notified the data subject that direct marketing is one of the purposes for which the personal data is collected, obtained express consent from the Complainant before sending her marketing messages and

provided a simplified opt out mechanism. This burden was not discharged by the Respondent as it failed to prove that it obtained consent from the Complainant.

32. The Respondent's claim that personal data may be collected indirectly where the data subject has deliberately made the data public does not apply in this case as the Respondent proceeded to send marketing messages to the Complainant without obtaining her express consent contrary to Section 37 of the Act.

33. It is important to emphasize that using publicly available personal data for marketing purposes without obtaining express consent from the data subject constitutes a violation of Section 37 of the Act and is therefore unlawful.

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

## II. **WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS.**

35. 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.

36. The Complainant stated that the remedy she was anticipating was for the Respondent to only send messages to people who have directly contacted them.

37. The Respondent is therefore **ordered to erase the Complainant's personal data from its records/database and stop sending direct marketing messages to the Complainant.** The Respondent is required to comply with this order and provide proof of compliance to this Office within fourteen days of being served with this Determination, failure to which an enforcement notice shall issue against the Respondent.

## H. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable.
- ii. The Respondent is hereby **ordered to erase the Complainant's personal data from its records/database and stop sending direct marketing messages to the Complainant** within fourteen days of being served with this Determination, failure to which an enforcement notice shall issue against the Respondent.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

**DATED** at **NAIROBI** this 4<sup>th</sup> day of September 2024.



**IMMACULATE KASSAIT, MBS  
DATA COMMISSIONER**