



## OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0381 OF 2024

**SANDRA BONARERI ONGAKI.....COMPLAINANT**

**-VERSUS-**

**ZEROX TECHNOLOGY LIMITED.....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 lodged a complaint against the Respondent and its product Asapkash alleging the Respondent's agents had been calling her persistently for a loan that she was not a party to.

#### **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 Complainant on 6<sup>th</sup> March 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainant who was 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 20<sup>th</sup> March 2024 referenced ODPC/CONF/1/5 VOL 1 (860). In the notification of the complaint, the Respondent was informed that if the allegations by the Complainant were true, they were in violation of various sections of the Act. Further, the Respondent was asked to provide this Office with the following:
  - a. A response to the allegation made against them by the Complainant;
  - b. Any relevant materials or evidence in support of the response;
  - c. Details of how they obtained the Complainant's personal details;
  - d. The legal basis relied upon to engage with the Complainant's;
  - e. Whether or how they fulfilled the duty to notify under Section 29 of the Act;

- f. Whether the Complainant consented to the processing of their personal data;
  - g. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant; and
  - h. The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take again.
8. The Respondents responded to the allegations *vide* letter dated 16<sup>th</sup> April 2024.

**D. NATURE OF THE COMPLAINT**

9. The Complainant alleged that she was being constantly contacted by Asapkash, a product of the Respondent, demanding that she contact a relative responsible for a defaulted mobile loan.
10. She stated that she was not involved in the loan and she indicated to the Respondent that she was not accountable for addressing such matters.

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

**i. THE COMPLAINANTS' CASE**

11. The Complainant provided screenshots of several numbers that she alleged belonged to agents of the Respondent.
12. She alleged that as at the date of the complaint, she was still receiving multiple calls and despite blocking the numbers, they still contacted her using different numbers.

**ii. THE RESPONDENT'S RESPONSE**

13. The Respondent filed a response to the notification of complaint, received on 16<sup>th</sup> April 2024, and stated that after a loan application, their clients are required to provide at least two emergency contacts, particularly their names and phone numbers for purposes of contacting them when they are unable to reach the loanee to remind them to repay their defaulted loan.
14. They stated that they send OTPs to the provided emergency contacts via SMSs where they can agree or reject to be the client's emergency contact. In case they agree, they disburse the loan to the clients and if they reject or ignore the

OTP, they reject the client's request for a loan. The OTPs are valid for a maximum of two hours and they proceed to cancel the loan request by the client and they are notified of the reasons for rejection.

15. The Respondent indicated that the Complainant was listed as an emergency contact and her phone number was provided by the loanee. The loanee defaulted her loan prompting them to contact the Complainant who was listed as her emergency contact.

16. The Respondent alleged that they tried to contact the Complainant to settle the complaint with her to no avail.

17. That after this complaint, they decided to stop contacting all emergency contacts provided by their clients and proceeded to encrypt their phone numbers as a mitigation measure to ensure such cases do not occur again.

18. The Respondent stated that they have also ensured that their agents cannot see the emergency contact phone numbers or their names by hiding them from the interface.

19. The Respondent attached images showing the loan details of the loanee and her emergency contacts.

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

20. Previous investigations conducted by this Office in **ODPC COMPLAINT NO. 0018 OF 2024 Jeremiah Okello vs Zerox Technology Limited** established that numbers provided by the Complainant with the prefix +254711082XXX belonged to the Respondent. It is also noteworthy that the Respondent did not deny that these numbers belonged to them.

21. Pursuant to Regulation 13 (3) of the Enforcement Regulations which states that in investigating a complaint, the Data Commissioner shall be guided by the provisions of the Fair Administrative Action Act, 2015, it was prudent to obtain a rejoinder from the Complainant based on the Respondent's response.

22. In an email dated 18<sup>th</sup> April 2024, the Complainant stated that she was not a signatory of a guarantor to the loan in question hence she was not privy to the terms of the contract and was not a party to the same.

23. The Complainant also denied that the Respondent tried to contact her to settle the complaint. She stated that she did not receive such communication and no attempts were made to settle the matter with her directly.

24. The Respondent did not provide proof of the attempt to contact the Complainant to settle the matter. They also did not provide proof that they sent the Complainant the OTP for her to accept or reject to be listed as an emergency contact.

#### **G. ISSUES FOR DETERMINATION**

25. In light of the above, the complaint, the Respondent's responses and evidence adduced together with the investigations conducted, 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**

26. The Complainant is a data subject as per the definition under the Act and has rights as stipulated under the Act. Specifically, under Section 26 (a) the Complainant had the right to be informed of the use to which her personal data was to be put, in this case, the listing of her phone number as an emergency contact of a person who borrowed a loan from the Respondent.

27. From the Respondent's response, the evidence adduced and investigations conducted by this Office, the Complainant was not informed that her number was listed as an emergency contact by the loanee.

28. The Respondent alleged that it sent the Complainant an OTP via SMS for her to agree or reject to be listed as an emergency contact prior to disbursement of the loan. There was no evidence of such allegation to prove that the Complainant was duly informed that her phone number was listed as an emergency contact.
29. Further, the Complainant had the right to object to the processing of her personal data as per Section 26 (c) of the Act. She exercised this right by stating that she was not accountable for addressing such matters. However, the calls from the Respondent persisted with the callers resorting to pressurizing her to engage with the loanee.
30. Therefore, the Respondent did not uphold her right to object to the processing of her personal data.
31. Therefore, this Office finds that the Complainant's rights under Section 26 (a) and (c) were infringed by the Respondent.

## II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

32. The Respondent is a data controller as per the definitions of the Act and is therefore mandated to fulfil its obligations as such under the Act.
33. Section 28 (1) provides that a data controller **shall** collect personal data **directly** from the data subject. Section 28 (2) gives instances where a data controller can collect personal data indirectly. However, the Respondent did not prove that it had any basis for indirect collection of the Complainant's personal data, specifically under Section 28 (2) (c) where a data controller can collect personal data indirectly where the data subject has consented to the collection from another source.
34. The Respondent stated that the borrower listed the Complainant as her emergency contact. This assertion is contrary from the provisions of Section 28 where a data controller is obligated to collect personal data only **directly** from the data subject unless the instances under Section 28 (2) are proven. In this case, they were not.

35. Section 30 of the Act provides for the lawful basis of processing personal data and states 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 or the processing is necessary for the purposes listed in subsection 1 (b). The Respondent did not prove that it sent the Complainant the OTP message to allow her to accept or reject being listed as an emergency contact and therefore failed to establish that they had consent to process the Complainant's personal data.

36. Further, Section 32 of the Act states that 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. The Respondent failed to provide proof of the pop-up message or OTP allegedly sent to the Complainant thereby failing to discharge the burden laid upon them pursuant to Section 32 of the Act.

37. In light of the above, this Office finds that the Respondent did not fulfil its obligations under the Act.

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

38. 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.

39. Section 65 of the Act provides 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. The Section indicates that damage included financial loss and damage not involving financial loss including distress.

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

40. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's rights under Section 26 (a) and

(c) were infringed upon by the Respondent. The Respondent failed to inform the Complainant the use of her personal data, and had her listed as an emergency contact without his express consent. The Respondent is also a repeat offender with complaints of similar nature despite issuing Enforcement Notices with measures that have yet to be implemented.

41. In this context, the Respondent is hereby ordered to pay the Complainant **Kenya Shillings Five Hundred Thousand (Kshs. 500,000)** for the infringement of his right to be informed under Section 26 (a) of the Act and the right to object under Section 26 (c) of the Act.

42. The Respondent is in a continuous violation of several obligations under the Act as analyzed above. These obligations have been articulated in previous Enforcement Notices issued against the Respondent pursuant to Section 58 of the Act.

43. The Respondent is therefore directed to adhere to the Enforcement Notice Ref No. **ODPC/CONF/1/7/2 VOL 1 (63)**, particularly measures 4,5,6 and 7 within thirty (30) days of receipt of this determination.

#### **H. FINAL DETERMINATION**

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

- i. The Respondent is hereby found liable for infringement of the Complainant's rights and non-compliance of its obligations under the Act;
- ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Five Hundred Thousand (Kshs. 500,000)** as compensation; and
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

**DATED** at **NAIROBI** this 3<sup>rd</sup> day of June 2024.



**IMMACULATE KASSAIT, MBS**  
**DATA COMMISSIONER**