



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 817 OF 2024

CHRISTINE OCHOLLA.....COMPLAINANT

-VERSUS-

NATIONAL SOCIAL SECURITY FUND.....1ST RESPONDENT

OFF GRID CONCEPTS LIMITED.....2ND 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 11th June 2024 alleging that her video was published and circulated by the 1st Respondent, without obtaining prior consent, and that the Respondents benefitted financially without compensating her.

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 11th 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 1st Respondent of the complaint filed against it *vide* a letter dated 4th July, 2024 and referenced ODPC/CONF/1/5 VOL II (30).
8. Pursuant to Regulation 12 of the Enforcement Regulations, the Office, ordered Off Grid Concepts Limited to be enjoined as a Respondent *vide* a letter dated 31st July, 2024 and referenced ODPC/CONF/1/5 VOL II (68).
9. In the Notification of the Complaint to the 1st Respondent and in the Notice to enjoin Off Grid Concepts Limited as a party, the Respondents were informed that if the allegations by the Complainant were true, they were in violation of various provisions of the Act. Further, they were asked to provide this Office with the following: -
 - a. A response to the allegations made against them by the Complainant;
 - b. Any relevant materials or evidence in support of the response;

- c. The lawful basis relied upon to process and engage with the Complainant's personal data;
 - d. Proof of consent from the Complainant to use / publish her video for commercial purposes;
 - e. The Indemnity Agreement Form duly filled and signed by the Complainant;
 - f. A detailed description of how they fulfill the rights of a data subject;
 - g. 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
 - h. Any other relevant information they wish the Office to consider.
10. The 1st Respondent responded to the Notification of Complaint letter *via* two letters; one dated 9th July, 2024 and the other dated 29th August, 2024.
11. The 2nd Respondent responded to the allegations levelled against it *via* a written statement from its Director dated 3rd September, 2024.
12. This determination is therefore as a result of analysis of the complaint as received, the responses by the Respondents and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

13. The Complainant alleged that her video was published and circulated by the Respondents without obtaining prior consent, and that the Respondents benefitted financially without compensating her.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

14. The Complainant alleged that on 19th April 2024, a representative of NSSF ("1st Respondent's representative") called her and introduced herself as an employee of NSSF in the Corporate Communications Department. She informed the Complainant that she was following her on her YouTube Channel and that she was very impressed by her content. She further asked the Complainant whether

she could talk to NSSF's employees who have retired and who are about to retire to encourage them on life after retirement. The interview was to be done at NSSF offices.

15. The 1st Respondent's representative explained to the Complainant that there was not going to be compensation but the Complainant would be given an appreciation fee of Kshs. 20,000/= . The Complainant stated that she was hesitant, but she was told to think about it. The following day, the Complainant called the 1st Respondent's representative and told her that she would give it a try. The 1st Respondent's representative then sent an email capturing what they had discussed.
16. The Complainant stated that on 25th April 2024, she received a call from a Director at the 2nd Respondent's Company ('2nd Respondent's representative'). He informed her that he was following up on her discussion with 1st Respondent's representative and that he would be the one interviewing her but at her home. The Complainant asked why not at NSSF offices as earlier indicated and the 2nd Respondent's representative told her that since her audience would be retirees, it would be better done at her home, to depict the picture of a retiree. He then sent the Complainant the set of questions he would ask. On receiving them, the Complainant was taken by surprise because the questions were geared towards promoting NSSF. The Complainant asked the 2nd Respondent's representative where the video would be played, and he responded that it would be posted on NSSF's YouTube page.
17. The Complainant called the 1st Respondent's representative again about the new arrangement who told the Complainant that she would send her an Indemnity Agreement Form after the interview, to fill in, and that her video would only be played after she had read and understood the agreement. The interview went on and the 2nd Respondent's representative promised to send it to the Complainant to view it before it was used.
18. On 7th May 2024, the 2nd Respondent's representative sent the Complainant the edited version and when she watched it, she was very impressed by what came out. He also told the Complainant that it was excellent.

19. The Complainant then called the 1st Respondent's representative and inquired about the Indemnity Agreement Form and she was informed that it was not ready. She also confirmed that the video would not be used in any way until the Complainant signed the contract.
20. On the 8th May 2024, the 1st Respondent's representative sent the Complainant the Indemnity Agreement Form via WhatsApp and when she read it, it was clearly stated that she would not be paid anything. The Complainant provided a copy of the form as proof.
21. This surprised the Complainant as that was not what she expected. She then consulted people who were more experienced in the field, and they advised her that the best she could ask for is Kshs. 150,000/= for a two-year contract. She sent what she thought would be the best agreement between NSSF and herself but to her surprise, the response was that NSSF did not have such a budget and they could not afford to pay what she had requested. NSSF further stated that they would not continue with the editing and use of the Complainant's video. The Complainant responded by stating that it was fine and took it that the case was closed. The Complainant attached screenshots of email correspondences as proof.
22. The Complainant averred that on 16th May 2024, a friend of hers who works with NSSF called her informing her that her video had been played during the NSSF National Strategic Launch and congratulated her on how she enjoyed her video when NSSF were launching their Strategic Plan on 7th May 2024.
23. The Complainant stated that she was shocked because the 1st Respondent's representative had assured her that they would not use her video. It further surprised her that the video was used a day before the Indemnity Agreement Form was sent to her. The very same day, 7th May 2024, when the video was sent to the Complainant for her comments, is the same day that it was being played on National TV stations (NTV, KTN, KBC and TV47) without her knowledge. Further, the Complainant alleged that all staff members of NSSF were sent for the link for the Strategic Plan Launch and first on the screen was her video.

24. The Complainant stated that she immediately sent a message to the 1st Respondent's representative and raised the issue of breach of her rights and asked for Compensation because her video was used. The 1st Respondent's representative still denied that the video was used. The Complainant then sent her the clip from NTV, and she was allegedly shocked to see it.
25. The Complainant averred that the video on NTV that aired the Launch had since been made private and she took this as an attempt to conceal evidence by NSSF of their wrongful conduct and breach of her rights. The Complainant further stated that she didn't understand how the video would be played and that the explanation by the 1st Respondent's representative that she had no idea, yet that was directly under her department was not honest either.
26. The Complainant stated that the 1st Respondent's representative attempted to blame the 2nd Respondent's representative as the one to sort out the Complainant financially. The Complainant told the 1st Respondent's representative that she was the first one to get in touch with her on the intention by NSSF to have her do a video that would be used to encourage retirees. The Complainant also reminded the 1st Respondent's representative that she was the one who gave the Complainant's contacts to Mr. The 2nd Respondent's representative to get in touch with her. Prior to this date, the 1st Respondent's representative had not informed the Complainant that the 2nd Respondent was an independent contractor.
27. The Complainant alleged that the 2nd Respondent's representative called her and admitted that the airing of her video was wrong as it was done without her signing any agreement or giving any consent.
28. The Complainant argued that the 1st Respondent, through its employees and/or agents/ contractors engaged in unauthorized disclosure of her data by circulating the content she had produced in video form to their benefit without her consent and in flagrant breach and contravention of the Data Protection Act.

29. Additionally, she stated that the 1st Respondent through its employees and/or agents/contractors used the Complainant's data to their financial benefit and gain without compensating her.
30. The Complainant averred that the 1st Respondent published and circulated her video not only internally, and noting that it is a big organization, but also externally and nationwide as their strategic launch was aired on NTV, KTN and Citizen live and thereafter the link remained available online and she provided this Office with the link.
31. The Complainant stated that she is entitled to compensation for the breach and that despite her demand to the 1st Respondent and their contractor the 2nd Respondent's, they have failed to compensate her.
32. The Complainant stated that the Respondents have admitted being in breach of her rights as stated and ought to compensate her.
33. The Complainant further stated that she is retiree and through her own efforts and initiative she has built her YouTube Channel and that their conduct is in flagrant breach of the efforts she has made to build her channel and obtain a following.
34. In addition to the above, the Complainant averred that the 1st Respondent is a statutory body with a national and wide presence and that the video was circulated to a wide audience both internally and externally in the country. Having been online, the same was not just limited to Kenyans but any person online. This factor explains the extent of breach and which should receive commensurate compensation for the wrong done but also to deter future impunity by the 1st Respondent and/or its agents.
35. The Complainant stated that the 2nd Respondent's representative is involved in video production and is aware of his obligations in protecting the Complainant's privacy and cannot pass the blame on the 1st Respondent. He is equally to blame for failure to meet his obligations under the Data Protection Act.
36. In conclusion, the Complainant prayed for the following: -

- i) That an investigation be conducted within the mandate of the Office under Section 8 of the Data Protection Act as well as the Data Protection (Complaints Handling Procedure and Enforcement) Regulations.
- ii) That the Office writes to the Respondents regarding the above issues, buttressing the seriousness of the violations and breach and need for immediate action for them to stop the breach.
- iii) That the Office delivers a determination under Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations.
- iv) That in making a determination, the Office issues a declaration that the circulation and use of her video recording by the Respondents is unlawful, unconstitutional and a violation of her fundamental rights and freedoms under Article 31 of the Constitution of Kenya.
- v) An order and or directive compelling the Respondents to jointly and severally compensate her for the damages and loss arising from the wrongful editing, use, display and circulation of her video without her express authority. Such damage should not be less than Kshs. 5 million due to the impunity and wide use of her video for a long period of time exclusive of statutory deductions and all legal expenses.
- vi) Any other measures that the Office deems fit under the Data Protection Act and the Data Protection (Complaints Handling Procedure and Enforcement) Regulations.

ii. THE 1ST RESPONDENT'S RESPONSE

37. The 1st Respondent in its response letter dated 9th July 2024, stated that in the course of discharging its obligations, it controls and processes the data of its members and dependants and has various organizational and technical policies for managing the data of the members and dependants. These include: -

- a) The ICT Policy
- b) Access to Information Policy
- c) Records Management Policy

38. The 1st Respondent further stated that as part of discharging its mandate and to encourage the public to save for retirement and old age, it usually conducts extensive public awareness initiatives on its mandate and functions as well as to assure the public of accessibility to their savings. Testimonials of retirees and their experience with respect to accessing their savings are normally recorded for public benefit and information.
39. While preparing for the launch of its Corporate Strategic Plan, the 1st Respondent deemed it fit to collaborate with various stakeholders including serving employees, retirees and dependants of deceased retirees to provide testimonials on responsiveness and effectiveness of its Fund in processing benefits. Upon careful consideration of many retirees, the 1st Respondent settled on the Complainant as an appropriate stakeholder to provide a testimonial on her experience with the Fund and particularly how she was easily facilitated to access her benefits from the Fund. This was informed by the content she airs on her YouTube channel which highlights her life in retirement. Upon consultation, she accepted to run an interview with the Fund's independent contractor (the 2nd Respondent) that was to be aired during the launch of the Fund's Corporate Strategic Plan 2023- 2027.
40. It was agreed by all parties that the Complainant would be given a token of Kshs.20,000/= in appreciation of her support by sharing her retirement experience with the 1st Respondent in a video recording. In addition to collaborating with 1st Respondent, the video recording interview would have publicized and increased views of her page noting that her content was aligned to the Fund's mandate. The 1st Respondent provided email and WhatsApp communications between its representative and the Complainant, on various dates, as proof.
41. The 1st Respondent averred that, it competitively procured and engaged the 2nd Respondent as an independent contractor, through its representative and proprietor. It was the expectation of the 1st Respondent that at all material times the 2nd Respondent's representative would adhere to legal requirements while executing the assignment including requirements of the Data Protection Act while engaging other third parties as guided and instructed by the 1st

Respondent. The Complainant was also aware that the 1st Respondent had engaged a third party for purposes of the interview and preparation of the resultant content for publication. The 1st Respondent provided a Purchase order dated 24th April 2024 issued by itself to the 2nd Respondent, to provide photography and Video Services, as well as email correspondences dated 25th April 2024 from the 2nd Respondent's representative to the Complainant, and her acknowledgement of the same as proof.

42. The 1st Respondent asserted that it was not true that the privacy of the Complainant's home was invaded as the Complainant voluntarily shared the location and directions to her home for purposes of recording the interview. The 1st Respondent provided a copy of WhatsApp message with PIN location attached as proof.
43. Upon conclusion of the interview, the 1st Respondent was not satisfied with the quality of the edited content and instructed the 2nd Respondent not to air or publish the content until the same is properly edited and all measures including execution of an indemnity are adhered to. The 1st Respondent provided WhatsApp communication between them and the Complainant between 19th April 2024 and 22nd May 2024. This was in line with its record management Policy which requires that statutory and regulatory requirements are adhered to while obtaining electronic data. The 1st Respondent was thus enforcing its policy by instructing the third-party service provider, Off Grid Concepts, not to publish any content received from the Complainant.
44. However, to its shock and utter dismay and contrary to its instructions, the third-party service provider, Off Grid Concepts, who was also providing Public Address System Services proceeded to publish the unfinished content during the launch of the 1st Respondent's Corporate Strategic Plan (CSP). This Event was transmitted "Live" on national televisions (NTV, KTN, KBC, TV47) without the express permission or approval from the 1st Respondent.
45. The 1st Respondent vehemently denied the allegation by the Complainant that her data was used for financial benefit and gain without compensation. The 1st Respondent stated that it did not directly send any content to media houses for

financial gain. There was no intended financial benefit as the 1st Respondent does not make any money through YouTube Advertisements and the Complainant is put to strict proof thereof.

46. Further, the Complainant did not at any time directly or commercially promote the 1st Respondent. The 1st Respondent averred that it should not be held liable for the actions of an independent service provider. As demonstrated above, the 1st Respondent's Policy on Access to Information safeguards against release of personal data or information that would compromise the legitimate private interests of any party. The 1st Respondent or its employees did not breach this policy.
47. Upon learning of the publication of the unauthorized content and to mitigate the risk of exposure to the Complainant, the 1st Respondent immediately instructed the 2nd Respondent to pull down the content thereby limiting any breach or exposure to one incident. In the circumstances the adverse risk to the Complainant, if any, was limited to one incident. The 1st Respondent provided the communication with the 2nd Respondent as proof.
48. The 1st Respondent stated that the Complainant contacted them over the alleged breach of her right and they made every effort to reach an amicable settlement with the Complainant which she rejected and instead made demands for monetary compensation first of Kshs, 150,000 and then Kshs. 5 million then later Kshs 500,000 which was contrary to the initial arrangement where she would have received a token of Kshs. 20,000 for her interview. The shifting of demands by the Complainant are tantamount to unjust enrichment and borders on extortion. The 1st Respondent is a custodian of Public Funds for retirement and does not have the amounts demanded by the Claimant. This was communicated to the Complainant.
49. The 1st Respondent asserted that it did not commit any data breach on its part.
50. In addition to the above, the Complainant, in her complaint, acknowledged that the actual violation and breach of her rights was perpetrated by the 2nd Respondent's representative who disregarded lawful instructions and who in his line of profession was aware of the need for consent to publish any content

involving other third parties, and not the 1st Respondent. The 1st Respondent is not vicariously liable for the actions of the 2nd Respondent's representative as there was no sufficient close connection between the work that the 2nd Respondent's representative was authorized to do. He was authorised to interview the Complainant, obtain the Fund's approval regarding the quality of the content, and obtain the consent of the Complainant by obtaining her signature to the Indemnity Agreement and payment of the agreed amount.

51. The 1st Respondent stated that it has collaborated with retirees in various initiatives and obtained testimonials which are normally published upon completion of indemnity agreements. The 1st Respondent is a law-abiding institution and did not authorize publication of the Complainant's content without her consent. The same was solely published by the 2nd Respondent. The actions of the 2nd Respondent should not be visited on the 1st Respondent. The 1st Respondent provided copies of previous indemnities executed by the 1st Respondent.

52. According to the 1st Respondent, by failing to comply with the above requirements, the 2nd Respondent acted outside the scope of his work as he did not comply with the set requirement of getting final approval from the 1st Respondent as well as obtaining the consent of the Complainant. By so acting, the 2nd Respondent's representative assumed the role of a data controller by sharing the Complainant's data without complying with the requirements set out above.

53. In the circumstances the 1st Respondent is not liable for any actual data breach as the 2nd Respondent and its representative, in publishing the content, did not act in accordance with the authority of the 1st Respondent.

iii. THE 2ND RESPONDENT'S RESPONSE

54. The 2nd Respondent responded to the allegations made against it through a statement dated 3rd September 2024.

55. In the statement, the Respondent, through its director, stated that it was contracted as a supplier for the 1st Respondent, to do testimonials on its clients, on their lives after retirement.

56. The 2nd Respondent stated that the Complainant was among the people that he was told to interview by the 1st Respondent.
57. The 2nd Respondent further stated that he was dealing with the Communications and PR Department at the 1st Respondent's Office, the 1st Respondent's representative.
58. The 1st Respondent's representative introduced the 2nd Respondent's representative to the Complainant and they communicated and agreed on when to he was to go and interview the Complainant. The Complainant agreed to do the interview at her house as she had also done another interview on the Lynn Ngugi show.
59. The 2nd Respondent's representative averred that on 26th April 2024, him and his cameraman went to the Complainant's house for the interview. The interview was about her life after retirement and how she received her NSSF funds.
60. The 2nd Respondent's representative stated that they finished the interview and the Complainant was to sign an indemnity form that was to be sent to her by 1st Respondent's representative.
61. The 2nd Respondent's representative asserted that the video was edited and he shared it with the Complainant, which she said was okay.
62. The 2nd Respondent stated that the 1st Respondent was launching its Corporate Social Plan and there were clips that were to be played during the event. All the NSSF materials were in one folder and his technical team aired the Complainant's clip without his knowledge as they assumed that all the clips in the NSSF folder were to be played during the event.
63. The 2nd Respondent's representative stated that he realized that the clip was played erroneously and had it pulled down immediately. The Complainant also realized it and she contacted the 1st Respondent, who later contacted him and he explained the mistake.

64. The 2nd Respondent's representative stated that he contacted the Complainant and explained what had happened and admitted that it was his mistake and not the 1st Respondent's and asked for forgiveness.
65. The Complainant told the 2nd Respondent's representative that he had breached her privacy by showing her house but the 2nd Respondent's representative averred that she has a YouTube channel and shoots from her house.
66. The 2nd Respondent's representative stated that the Complainant said that she will not deal with him any further, as he was just a contractor and went to the 1st Respondent and told them she will sue them.
67. The 2nd Respondent's representative averred that he stopped pursuing the matter at that point and let the Complainant deal with the 1st Respondent.
68. In conclusion, the 2nd Respondent admitted that it was his mistake, as he did not brief his team appropriately not to air the clip, and that the 1st Respondent is not liable for any breach of privacy. Additionally, the clip is purely non-commercial as it is about the Complainant's life story.

F. INVESTIGATIONS UNDERTAKEN

69. The Office analysed the complaint as lodged, reviewed the responses submitted by the Respondents, and analysed all documents provided by the parties as evidence.
70. The Office established that the Complainant's video was circulated to a wide audience both at NSSF and nationally, through national media stations and YouTube.
71. The Office established that the 2nd Respondent was engaged as an independent contractor (data processor) by the 1st Respondent to offer photography and videography services.

G. ISSUES FOR DETERMINATION

72. It is not in contention that the 2nd Respondent aired the Complainant's video to a wide audience during the launch of NSSF's Strategic Plan.
73. In light of the above, the following issues fall for determination by this Office:

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- i. Whether the Respondents fulfilled their obligations under the Act;
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENT FULFILLED THEIR OBLIGATIONS UNDER THE ACT

74. The Complainant alleged that her video was published and circulated by the Respondents without obtaining prior consent.

75. the 1st Respondent averred that it engaged the services of the 2nd Respondent to offer photography and videography services and that it authorized the 2nd Respondent to, inter alia: -

- i) Interview the Complainant;
- ii) Obtain approval from the 1st Respondent regarding the quality of the content and the airing of the video; and
- iii) Obtain consent from the Complainant by obtaining her signature to the Indemnity Agreement and payment of the agreed amount.

76. The 2nd Respondent admitted to having published and circulated the Respondent's video without obtaining consent.

77. Section 42(3) of the Data Protection Act, 2019 (hereinafter as 'the Act') states that, *"where a data processor processes personal data other than as instructed by the data controller, the data processor shall be deemed to be a data controller in respect of that processing."*

78. In this case, the 2nd Respondent shall be deemed as the data controller as it acted contrary to instructions issued by the 1st Respondent, the data controller.

79. Further, Section 65(2)(b)(ii) of the Act states that, *"a data processor involved in processing of personal data is liable for damage caused by the processing only if the processor has acted outside, or contrary to, the data controller's lawful instructions."*

80. The 2nd Respondent in the statement dated 3rd September, 2024 admitted to having aired the Complainant's video clip erroneously and absolved the 1st Respondent from liability.

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81. Section 30(1)(a) of the Act provides for lawful processing of 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.*"
82. The 2nd Respondent by airing the Complainant's video clip during the launch of NSSF's Strategic Plan, violated the lawful requirement of obtaining prior consent before processing the Complainant's personal data.
83. Section 25 of the Act sets out the principles of data protection. The 2nd Respondent violated the fairness and transparency principle by airing the Complainant's video without obtaining consent. The fairness principle requires the Respondent to handle the Complainant's personal data in ways she would reasonably expect. In this case, the Complainant only consented to having her video taken but did not consent to having it aired and circulated by the 2nd Respondent. By airing the video during the launch of NSSF's Strategic Plan, the 2nd Respondent acted unfairly because the Complainant did not expect her video to be used during the launch.
84. The Complainant alleged that the Respondents used her personal data and benefitted financially without compensating her.
85. 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.*"
86. 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.

87. The airing of the Complainant's video clip did not confer any direct benefit to the 2nd Respondent, as the content of the video clip did not serve to advertise or otherwise promote the goods/services offered by the 2nd Respondent's Company. Therefore, the 2nd Respondent did not use the Complainant's personal data for commercial purposes as alleged.

88. From the foregoing, this Office finds that the 2nd Respondent did not fulfill its obligations under the Act as outlined above.

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

89. 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.

90. The Complainant prayed that the Office issues a declaration that the circulation and use of her video recording by the Respondents was unlawful, unconstitutional and a violation of her fundamental rights and freedoms under Article 31 of the Constitution of Kenya. A declaration is not one of the remedies provided for under Regulation 14(3) of the Enforcement Regulations and therefore this Office has no power to issue one. The prayer for the above declaration is hereby denied.

91. The Complainant also prayed for an order compelling the Respondents to jointly and severally compensate her for the damages and loss arising from the wrongful editing, use, display and circulation of her video without her express authority. She prayed for compensation amounting to not less than Kshs. 5 million due to the impunity and wide use of her video for a long period of time exclusive of statutory deductions and all legal expenses.

92. Section 65 of the Act provides for compensation to data subjects 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.”

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

94. In considering whether to issue compensation, this Office takes into consideration the fact that the 2nd Respondent unlawfully processed the Complainant’s personal data.

95. While the Office finds that the 2nd Respondent unlawfully processed the Complainant’s personal data, it declines to award the Complainant Kenya Shillings 5 million as prayed for, as the amount is so inordinately high and an erroneous estimate of the damage.

96. The prayer for legal expenses incurred is denied by the Office as costs are not one of the remedies contemplated under the Act.

97. In view of the above, the Office hereby orders the 2nd Respondent to pay the Complainant **Kenya Shillings four hundred and fifty thousand (KES. 450,000/=) as compensation** for the unlawful processing of her personal data. In so doing, the Office takes into consideration the scope of publication of the video. Whereas the Complainant runs her own public YouTube channel, the 2nd Respondent caused the impugned video to be played on various national TV stations including NTV and KTN.

98. Having already established that the 1st Respondent is not liable for the actions of the 2nd Respondent, the order for compensation shall issue against the 2nd Respondent solely and not jointly with the 1st Respondent.

H. FINAL DETERMINATION

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

- i. The Complaint against the 1st Respondent is hereby dismissed.
- ii. The 2nd Respondent is hereby found liable.
- iii. The 2nd Respondent is hereby ordered to pay the Complainant **Kenya Shillings four hundred and fifty thousand (KES. 450,000/=) as compensation.**

- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 6th day of September 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER



