



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0453 OF 2024

HILDA MWANGI

SUING AS LEGAL GUARDIAN OF MNN (MINOR)..... COMPLAINANT

-VERSUS-

EDGAR OBARE.....RESPONDENT

DETERMINATION

(Pursuant to Section 8 (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. This Complaint is in respect of the Complainant's claim that the Respondent used the minor's image for commercial purpose on a telegram channel allegedly run and operated by the Respondent.

B. LEGAL BASIS

2. Article 31 (c) and (d) of the Constitution of Kenya 2010 provides for the right to privacy. Consequently, to further guarantee the same, the Data Protection Act, 2019 (hereinafter 'the Act') was enacted.
3. The Office of the Data Protection Commissioner (hereinafter 'this Office' 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 (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.

C. BACKGROUND

5. This Office received a complaint from the Complainant on 18th 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.
6. 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(918) and required their response within 21 days.
7. Through his Advocates, the Respondent responded to the notification of the complaint letter *vide* a letter dated 25th April 2024.
8. On 31st May 2024, the Complainant replied to the Respondent's response.
9. This determination is therefore a result of analysis of the complaint as received, the responses from the Respondent, and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

I. COMPLAINANT'S CASE

10. The Complainant contended that the Respondent is a social media influencer who currently operates a telegram community channel, known as BNN, that he has monetized for his gain.
11. The Complainant pleaded that the channel currently boasts a substantial subscriber base of 95,000 people with a monthly subscription fee of Kenya

Shillings Two Hundred (Kshs. 200), the total monthly revenue amounts to Kenya Shillings Nineteen Million (Kshs. 19,000,000).

12. The Complainant stated that on or around October 2023, she received news that the Respondent had published a picture of the Complainant's daughter, a minor, on his telegram channel without consent for his commercial gain.
13. According to the Complainant, the Respondent had received news that journalist Hxxxxx Mxxxxxx was the minor's father and for commercial benefit, the Respondent posted the minor's picture on the telegram channel.
14. The Complainant contended that she contacted the Respondent and instructed him to take down the minor's photo from the platform but instead, the Respondent responded by stating the following, "*I am not a journalist. If you feel parts of the story are false, please clarify and I will update the story. Okay, thanks for your time. It wasn't a pleasure.*"
15. According to the Complainant, the published picture of the minor was obtained from her Instagram account and posted/ published by the Respondent on his Telegram, BNN channel, without her consent, and despite her requests, the Respondent failed to remove the photo from the platform. The Complainant further stated that the minor's image continues to circulate on the Telegram channel.
16. Further, the Complainant stated that she firmly believes that the Respondent has unscrupulously benefitted from the minor's image publication, blatantly disregarding the crucial legal protections afforded to minors regarding their data and privacy.
17. The Complainant contended that the minor's image publication has posed a serious threat, exposed the minor to ridicule, and stripped her of her dignity. She stated that the minor has the right to not have her personal data processed on social media unless consent is given by the parent and the publication.
18. The Complainant further stated that she is aware that the father of the minor did not consent to the publication.

19. The Complainant maintained that the Respondent's actions have violated the minor's rights as contemplated under Sections 25, 26, and 33 of the Act.

II. RESPONDENT'S CASE

20. As stated above the Respondent through their Advocates on record responded to the allegations against it through a letter dated 25th April 2024.

21. In their response, the Respondent stated that:

- (i) The complaint as was filed and served did not contain a signature by the Complainant or her advocate and therefore as per advisory by his advocates the omission is fatal to the whole complaint and the same should be dismissed for lack of valid complaint.
- (ii) The Respondent stated that the story was not for financial gain but to help her since the father mentioned is a public figure and therefore subject to fair public scrutiny and to make the father/baby daddy recognize their daughter.
- (iii) Through credible sources, he has been informed that it is the Complainant who indirectly sent her friend to give him the story to make her baby daddy recognize their daughter;
- (iv) It is an indisputable fact that it is the Complainant herself who published the photo publicly in the first instance. The minor has been posted on social media severally by the parents and other blogs have featured them as they are public figures.
- (v) The minor's face is blurred and not identifiable in line with ethical blogging/ journalistic standards and data protection laws.
- (vi) The story was published almost a year before the complaint was instituted and that he has reasonable cause to believe that the Complainant used her friend to approach him to highlight her story as the parents were in bad terms then and now that they might be in good terms the Complainant is attempting an undeserved cash grab by filling this complaint pretending that the story reached him with no fault of her making.
- (vii) The story was never published on BNN Instagram platforms.

- (viii) The claim that the Telegram platform BNN where the story was posted has a subscription base of 90,000 people with a total monthly income of 19,000 is false is false and outrageous and had not attached any evidence. The channel referenced has 88K subscribers and is a free channel therefore does not earn 19 million a month as alleged.
- (ix) The BNN Premium subscription channel has only 3,300 subscribers as of 25/4/2024 and he has never gained any monetary gain out of the story.
- (x) The Respondent stated that he has always carried out due diligence and adhered to ethical standards set through various laws, rules, and standards in the country. He further stated that the Complainant was given the right to reply/clarify which she elected not to utilize;
- (xi) He is an innocent disseminator of information and he enables the public to practice citizen journalism whose details can be found online.
- (xii) He posts stories about celebrities that are sent to him by the general public and, in confidence posts them if they are credible and he is under legal/ethical duty as a blogging company not to disclose its sources.
- (xiii) The Complainant wants to mislead the Office of the Data Commissioner to gain undue monetary gain and that the Complainant looks financially motivated, malicious, and not really protecting the rights of the minor.
- (xiv) The Respondent stated further stated that it relied upon Sections 25(e), 30, 45, and 52 of the Act in processing the personal data.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

22. As part of her evidence, the Complainant adduced

- i) The images depicting the minor.
- ii) Images taken from the Complainant's social media and subsequently uploaded to the Respondent's Telegram channel.
- iii) Pictures identifying the minor and the Complainant.
- iv) The Complainant's National Identity Card.
- v) The Minor's birth certificate.

II. THE RESPONDENT'S EVIDENCE

23. As part of his evidence, the Respondent adduced:-

- i) The unsigned Complaint form.
- ii) The blurred and masked photos of the minor.
- iii) The message from the Complainant's friend who notified the Respondent of the story.

F. ISSUES FOR DETERMINATION

24. It is undisputed that the Respondent obtained the minor's photos from the Complainant's Instagram account and it is the Complainant's friend who informed the Respondent of the story.

25. Having considered the nature of the complaint, the evidence adduced by all parties to the complaint, and the investigations conducted by this Office, the issues for determination that arise are:-

- i. Whether the Complaint is properly lodged with this Office;
- ii. Whether the minor's personal data was lawfully processed;
- iii. Whether there was a violation of the minor's rights under the Act; and
- iv. Whether the Complainant is entitled to any remedy under the Act.

G. ANALYSIS AND DETERMINATION

I. WHETHER THE COMPLAINT IS PROPERLY LODGED WITH THIS OFFICE

26. The Respondent contended that the Complaint was not properly lodged with this Office as the Complaint form submitted was not signed by the Complainant. The Respondent urged this Office to dismiss the complaint terming it invalid as to that extent.

27. The Complainant on her part contended that a signature was not needed as the Constitution under Article 159 states that justice shall be administered without undue regard to technicalities and that the Data Protection (Complaints Handling Procedure and Enforcement) Regulations 2021 in Regulation 3 provides that the

object and purpose of the regulations is to facilitate a fair, impartial, just expeditious, proportionate and affordable determination of complaints lodged with the Data Commissioner in accordance with the Act and the regulations without undue regard to technicalities of procedure.

28. The Complainant further contended that Regulation 4(2) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations 2021 also provide that a complaint lodged may be lodged orally, through electronic means, including email, web posting, complaint management information system, or by any other appropriate means.

29. On this issue this Office finds that the lack of signature on the complaint was not fatal and did not render the complaint invalid. As aptly stated by the Complainant, this Office is mandated by the law under Article 159 of the constitution, Regulation 3 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations 2021 to resolve all complaints without undue regard to technicalities.

30. The Regulations invite this office to consider the substance of the Complaint and not the form it takes.

31. It is therefore our finding that in as far as issue no (I) is considered, the complaint has been properly lodged with this Office.

II. WHETHER THE MINOR'S PERSONAL DATA WAS LAWFULLY PROCESSED

32. In considering this issue, the Office will address the following questions –

- a. Was the processing for journalistic purposes?
- b. Was the Complainant's consent required from the onset for the Respondent to obtain the Minor's personal data?
- c. Was the processing for commercial purposes and thus express consent required?
- d. Was the minor deidentified?

Was the processing for journalistic purposes?

33. The Respondent in its response dated 25th April 2024, stated that the processing was lawful as provided for under Section 30 (viii) of the Act as it was for journalistic

purposes. The Respondent stated that he processed the minor's personal data lawfully as he was a journalist exercising public journalism. From the evidence adduced, we find these submissions in his response to the complaint contradicting what he had initially told the Complainant when the Complainant contacted him requesting the removal of the minor's image. He told the Complainant that he is not a journalist and if she felt parts of the story are false, she should clarify and he will update the story.

34. The Act and its attendant regulations do not define who a journalist is. However, the Media Council Act, 2013 defines a 'journalist' as any person who is recognized as such by the Council upon fulfillment of a criteria set by the Council. From this definition, one ought to be recognized as a journalist by the Media Council of Kenya for he or she to be able to process personal data as a journalist.
35. In this case, the Respondent did not demonstrate his recognition as a journalist by the Media Council of Kenya. As such, for all intents and purposes, the Respondent is not a journalist and cannot invoke the journalistic exemption provided for in the Act.

Was the Complainant's consent required from the onset for the Respondent to obtain the Minor's personal data?

36. It is not in dispute that the minor's image was obtained from the Complainant's publicly accessible social media account. By her own volition and actions, the Complainant had posted the minor's image on her social media platform which is a public domain accessible to all social media users. The uncontroverted fact that the Complainant took a photograph with the minor and posted it on her social media platforms is therefore the genesis of this complaint.
37. Having established the genesis of the complaint, this Office will assess whether from the onset, the Complainant's consent was required for the Respondent to collect the personal data from her social media.
38. Section 28 of the Act provides for collection of personal data. It provides

28. Collection of personal data

(1) A data controller or data processor shall collect personal data directly from the data subject

(2) Despite sub-section (1), personal data may be collected indirectly where-

(a) the data is contained in a public record;

(b) the data subject has deliberately made the data public;

(c)(emphasis ours).

39. As earlier stated, the Complainant by her own volition deliberately posted the minor's image on her public social media platforms. She manifestly made public the minor's image/photograph and appearance to a plurality of persons.

40. Consequently, by the Complainant manifestly making the photograph public through social media, any collection therefrom fell under Sections 28(2)(b) of the Act above. The Respondent did not have to obtain consent from the Complainant for the specific purpose of accessing and collecting the Complainant's photograph.

41. We further note that the Respondent's assertions that the allegation that the Complainant used her friend to approach the Respondent to highlight the story are uncontroverted. The Complainant did not dispute the assertions and or produce evidence to the contrary despite being given an opportunity to do so by this Office.

Was the processing for commercial purposes and thus express consent required?

42. Section 33 of the Act provides that every data controller or data processor shall not process personal data relating to a child unless consent is given by the child's parent or guardian and the processing is in such a manner that protects and advances the rights and best interests of the child.

43. In the instant complaint, the processing in question was the uploading of the minor's image on the Respondent's Telegram channel namely BNN.

44. The Complainant alleges that by the Respondent posting the minor's photograph in his social media channel that has a substantial subscriber base and a monthly subscription fee, the Respondent used the minor's personal data for commercial gain.

45. The Respondent, on the other hand, contended that the story was not for commercial and/or financial gain as it was to help the Complainant since the father mentioned is a public figure and therefore subject to fair public scrutiny and that it is the Complainant who indirectly sent her friend to give the story to make the minor's father recognize the child.

46. Sections 37 (1)&(2) of the Data Protection Act provides for commercial use of data. It provides:-

(1) 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 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.

(2) A data controller or data processor that uses personal data for commercial purposes shall, where possible, anonymize the data in such a manner as to ensure that the data subject is no longer identifiable.

47. Regulation 14 of the Data Protection (General) Regulations 2021 further provide for commercial use of personal data as follows:-

14. Interpretation of commercial purposes

(1) 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. [Emphasis ours]

48. From a collective reading of the above legal provisions, it is discernible that advancing a commercial transaction whether directly or indirectly using personal data amounts to the commercial use of personal data and as such, the data controller would require the express consent of the data subject to use the personal data.

49. Related to the complaint at hand, the Office notes that there was no evidence of the post advancing a commercial transaction whether directly or indirectly. The Complainant did not also demonstrate the same.

50. The Complainant stated that the Respondent has a channel with different levels of subscription inviting the users to pay for the subscription. The Complainant did not demonstrate that the image was posted on the BNN premium platform (a public pay-to-view channel).

51. This Office therefore finds that the Respondent did not use the minor's personal data for commercial purposes and express consent was not required in the circumstances.

Was the minor deidentified?

52. This Office notes from the evidence adduced that the minor's image as it appeared on the Respondent's platform was masked and blurred therefore the minor could not be identified from the same. Through masking the minor's image, the personal identifiers relating to the minor were removed thereby the minor was not identifiable.

53. From the totality of the foregoing, this Office finds that the Respondent did not process the minor's personal data unlawfully.

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

54. Section 26 (e) of the Act provides that a data subject has a right to deletion of false or misleading data about them. Section 40(1)(b) of the Act provides 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.

55. The Complainant contended that on or around October 2023 upon receiving news that the Respondent had posted the minor's image on his platform, the Complainant contacted the Respondent and requested him to take down the image.

56. From the evidence adduced this Office notes that the same does not have any indications of time and date. It cannot be ascertained when the Complainant lodged the request for the Respondent to pull down the image from the Respondent's channel.

57. As at the date of the Complaint, the minor's image had been pulled down from the Respondent's BNN channel.

58. That being said, it therefore follows that upon the Complainant exercising the minor's rights to erasure and rectification, the minor's image was deleted and pulled down from the Respondent's channel.

59. This Office therefore finds and determines that as far as issue no (iii) is concerned, the Respondent did not violate the minor's right to erasure.

IV. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDY UNDER THE ACT.

60. Pursuant to Regulation 14 (2) of the Enforcement Regulations, a determination shall state the remedy to which the complainant is entitled. The remedies are provided for in Regulation 14 (3) of the Enforcement Regulations.

61. Having considered the merits of the Complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent did not violate the minor's rights under the Act and that the minor's personal data was not processed unlawfully, it therefore, follows that there has not been a violation of the Act by the Respondent. As such, the Complainant is not entitled to any remedy sought.

H. FINAL DETERMINATION

62. In the ultimate, the Data Commissioner therefore makes the following final determination:

- i. The complaint is hereby dismissed.
- ii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 14th day of June 2024



Immaculate Kassait, MBS
DATA COMMISSIONER

