



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 0478 OF 2024**

**VICTOR KIBET SIELE .....COMPLAINANT**

**-VERSUS-**

**HOTEL WATERBUCK 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 alleged that the Respondent has been using the Complainant's image for commercial gain on their website without the Complainant's express 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 '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

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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 21<sup>st</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 15<sup>th</sup> April, 2024 referenced ODPC/CONF/1/5 VOL 1 (913). 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, among other things, the Respondent was 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 their response;
  - c) The lawful basis relied upon to process the Complainant's personal data;
  - d) Evidence as to whether the Complainant consented to the processing of their personal data for promotional purposes; and
  - e) A detailed description of whether it fulfills the duty to notify under Section 29 of the Act and how the same is fulfilled.

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8. The Respondent responded to the allegations made against it *vide* a letter dated 25<sup>th</sup> April, 2024.

#### **D. NATURE OF THE COMPLAINT**

9. The Complainant alleged that the Respondent, without proper and/or justifiable cause, processed his image without his consent for marketing and commercial purposes on their website.

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

##### **i. THE COMPLAINANTS' CASE**

10. The Complainant stated that the Respondent has been using his image taken while working as the Respondent's receptionist for commercial gain on its website.
11. The Complainant contends that the said image of him is being used without his express consent and the same is posted on the Respondent's hotel website to solicit clients for commercial gain.
12. The Complainant alleges that as a result of the careless use of his image by the Respondent, he has been unable to gain employment as other employers in the industry perceive him to be an employee of the Respondent who still had his image posted on its company website;
13. The Complainant further contended that despite, numerous notifications and complaints being lodged with the Respondent on the illegal use of the said image, the Respondent has refused, neglected, and failed to pull down the image from its website.

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

14. The Respondent maintained that it used the Complainant's image with his express consent.
15. The Respondent further stated that the Complainant personally consented to be photographed to have his image on the Respondent's website, and the publication

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of his image on the Respondent's website was done in good faith and was not an invasion of privacy.

16. The Respondent posited that the Complainant was aware that the photo session was for the company's website and he not only volunteered to participate but was also privileged and excited of the prospect of being designated as the face of the prestigious hotel.
17. The Respondent stated that if the Complainant elicited any objection to his photo being taken in the said circumstances, nothing would have stopped the hotel management from electing another employee to stand in his position.
18. The Respondent further contended that at no point, in the course of the Complainant's employment with the Respondent did the Complainant raise any concerns regarding the use of his image on its website and that by the Complainant complaining after the termination of employment is an afterthought and an opportunistic manoeuvre on the part of the Complainant to extort money from the Respondent.
19. The Respondent pleaded that the Complainant's active and voluntary participation in the photo session whose purposes were disclosed and understood by all the participants unequivocally implied his consent.
20. The Respondent also pleaded that at any point before and after the photo session, the Complainant had the option of objecting to the use of his image on the Respondent's website but he failed to do so.
21. The Respondent further stated that the complainant was informed of his rights as stipulated under section 26 of the Act and was aware of the intended recipient of data as its website received substantial traffic on a day-to-day basis. He was aware that his image would be posted on its website and that he would essentially be the face of its business.

## **F. SUMMARY OF EVIDENCE ADDUCED**

22. As evidence, the Complainant adduced the following:-

- i. Photographs of the Respondent's website containing the Complainant's image;
- ii. Letter dated 26<sup>th</sup> October 2023 addressed to the Respondent; and
- iii. The complainant's National ID card.

## **G. INVESTIGATIONS UNDERTAKEN**

23. In exercising its investigative mandate as provided for in the Act, this Office conducted an on-site visit and investigation on the Respondent on 29<sup>th</sup> May 2024.

24. During the visit, it emerged that the Complainant was employed by the Respondent from around 1<sup>st</sup> August 2022. It was not clear when the Complainant left the Respondent's employment as there was no termination letter. The Complainant allegedly absconded his duties for months.

25. The circumstances surrounding the photo shoot were that it was taken in the presence of the Complainant's colleagues who witnessed the same. The Complainant verbally consented to the photo of him being taken and to be used by the Respondent in its website.

26. The Respondent pulled down the Complainant's image when the Complainant through his advocates on record wrote the letter dated 26<sup>th</sup> October 2023 requesting the same to be pulled down.

## **H. ISSUES FOR DETERMINATION**

27. It is undisputed that:-

- a) The Complainant and the Respondent had an employer-employee relationship to the extent that the Complainant was the Respondent's receptionist.
- b) The Complainant's image was taken when the Complainant was the Respondent's employee.
- c) The Respondent used the Complainant's image on its website.

28. 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:

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- i. Whether the Respondent obtained the Complainant's consent as required by the Act to use his image for commercial purposes;
- 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 OBTAINED THE COMPLAINANT'S CONSENT AS REQUIRED BY THE ACT TO USE HIS IMAGE FOR COMMERCIAL PURPOSES**

29. Section 2 of the Act defines consent as any manifestation of express, unequivocal, free, specific, and informed indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data.

30. The definition of the Act details the minimum criteria of or for consent to be that it must be certain that the individual has consented, and what they have consented to. There must be a clear signal that they agree or have agreed to the processing. The unambiguity of the consent further links in with the requirement that consent must be verifiable to the extent that one must be able to demonstrate that the data subject consented to the processing.

31. From a combined reading of the above definitions, it is apparent that valid consent is a product of conscious decision-making and requires affirmative action. It should be demonstrable and capable of being proven.

32. Section 30 (1) (a) of the Act provides 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.

33. The Act goes further to state the conditions of consent. It states as follows concerning the conditions of consent:-

*32. Conditions of consent*

*(1) 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.*

*(2) Unless otherwise provided under this Act, a data subject shall have the right to withdraw consent at any time.*

*(3) the withdrawal of consent under sub-section(2) shall not affect the lawfulness of processing based on prior consent before its withdrawal.*

*(4) In determining whether consent was freely given, account shall be taken of whether, among others, the performance of a contract, including the provision of a service, is conditional on the consent of the processing of personal data that is not necessary for the performance of that contract. (emphasis ours)*

34. Section 37 (1) of the Act provides for commercial use of data and states, "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 the data subject or 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."

35. Regulation 14 (1) of the Data Protection (General) Regulations 2021 further elaborates Section 37 of the Act 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.*

36. It is undisputed that the Respondent used the Complainant's image in its website to advertise and market its facilities and services. As such, the Complainant's image was being used to advance the Respondent's commercial and economic interests. By the general public visiting the Respondent's website one is induced whether directly or indirectly to buy, join and or subscribe to the Respondent's services. This constituted the use of the Complainant's image for commercial purposes which required express consent.

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37. It was the Respondent's position that the Complainant's active and voluntary participation in the photo session whose purposes were disclosed and understood by all the participants unequivocally implied his consent. It maintained that the Complainant's conduct before, during, and after the photo session depicted that he voluntarily yielded consent to have his image taken and also have the same posted on its website.

38. Express consent requires a clear written statement confirming the granting of consent. It may take such forms as clicking an opt-in button or link, appending a signature, responding to an email requesting consent, selecting from yes or no options, *et cetera*. Where consent has been obtained orally, the same must be reduced into writing or recorded electronically, and a record of the script thereof be kept. That way, the consent can be proven by the Respondent as the burden of proof establishing a data subject's consent to the processing of their personal data for a specified purpose rests upon the data controller and or processor.

39. From the above, the Respondent's contentions fall short of what express consent entails as per the Act. In no circumstance is an implied consent inferred through actions as argued by the Respondent be deemed to be express, even if the said actions are apparent enough, to the Respondent.

40. That being said, it therefore follows that the Respondent has not discharged its burden of proof to demonstrate that the Complainant expressly consented to the use of his image for commercial purposes, as envisaged under Section 32 (1) and 37 of the Act.

41. This Office therefore finds that as far as issue no (i) is concerned, the Respondent did not obtain the requisite consent required by the Act to use the Complainant's image for commercial purposes.

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

42. Section 40 of the Act also provides for the right of rectification and erasure and states that a data subject may request a data controller or 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.
43. Further to the above, Regulation 12 (3) of the General Regulations provides that a data controller or data processor shall respond to a request for erasure within fourteen days of the request.
44. The Complainant rightfully requested the Respondent to cease using his image on its website and to immediately pull it down.
45. Upon exercising his rights to erasure and rectification, as confirmed by both parties, the Complainant's image was deleted and pulled down from its website.
46. This Office therefore finds and determines that as far as issue no (ii) is concerned, the Respondent did not violate the Complainant's rights as envisaged under the Act.

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

47. According 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.
48. Having considered the merits of the complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent processed the Complainant's image for commercial purposes without the requisite consent as stipulated under the Act, it therefore, follows that there has been a violation of the Act by the Respondent to that extent. The Respondent did not process the Complainant's personal data in accordance with Sections 30 (1) (a) and 32 (1) and 37 of the Act.

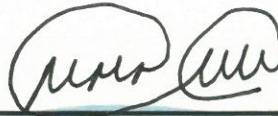
49. Section 65 (1) of the Act provides for compensation to a data subject and states that a person who suffers damage by reason of a contravention of a requirement of the Act is entitled to compensation for that damage from the data controller. Section 65 (4) of the Act states that "damage" includes financial loss and damage not involving financial loss, including distress.
50. Regulation 14 (3) (e) of the Enforcement Regulations further provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
51. The Complainant sought various remedies including that the Respondent takes down the post from its website, a penalty/fine, and compensation.
52. The Respondent contended that the award of compensation ought not to be awarded as the offending image was pulled down from its website. The Respondent further contended that in as much as the Complainant's image was being used by it on its website when he was its employee he never objected to the same and in any case he was being paid at all material times he was employed.
53. Having found that the Respondent did not obtain the requisite consent from the Complainant, and the Respondent continued using his image on its website even after the Complainant's employment lapsed, the Respondent is hereby directed to compensate the Complainant the amount of Kshs. **500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only)** for the continual use of the Complainant's image for commercial purposes on its website even after the Complainant left employment.

## **I. FINAL DETERMINATION**

54. In the ultimate, the Data Commissioner makes the following final determination;
- i. The Respondent is hereby found liable for the use of the Complainant's image for commercial purposes without express consent;
  - 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 18<sup>th</sup> day of June . 2024.



**IMMACULATE KASSAIT, MBS  
DATA COMMISSIONER**



