



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 502 OF 2024**

**FATUMA HADI ALI SUING ON BEHALF**

**OF J.A.A (MINOR) .....COMPLAINANT**

**-VERSUS-**

**NOVA PIONEER KENYA 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 Office received a complaint on 26<sup>th</sup> March 2024 from the Complainant. The complaint relates to the alleged use of the Complainant’s image for commercial purposes on two billboards and on the Respondent’s website, without obtaining consent from the Complainant.

**B. LEGAL BASIS**

2. Article 31(c) and (d) of the Constitution of Kenya 2010 provides for the right to privacy. Consequently, as an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter as ‘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(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 (Complaint 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 26<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 is an aggrieved data subject.
7. Pursuant to Regulation 11 of the Enforcement Regulations, this Office, notified the Respondent of the complaint filed against it *vide* a letter dated 28<sup>th</sup> March 2024 and referenced ODPC/CONF/1/5 VOL 1(902). In the Notification of the Complaint, the Respondent was informed that if the allegations by the Complainant were true, it was in violation of various provisions of the Act. Further, the Respondent was asked to provide this Office with the following: -
  - a. A response to the allegations made against it by the Complainant;
  - b. Any relevant materials or evidence in support of the response;
  - c. The legal basis relied upon to process and engage with the Complainant's personal data;

- d. Proof of consent from the Minor's parent (the Complainant) to use her image on its website and on billboards;
  - e. A detailed description of how it fulfils the rights of a data subject;
  - f. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint does not take place again; and
  - g. Any other relevant information it wishes the Office to consider.
8. The Respondent responded to the Notification of Complaint letter *vide* a letter dated 4<sup>th</sup> April 2024.
  9. This determination is therefore as a result of analysis of the complaint as received, the response from the Respondent and investigations conducted by the Office.

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

10. The complaint relates to the alleged use of the Complainant's image for commercial purposes on two billboards and on the Respondent's website, without obtaining consent from the Complainant.

#### **E. SUMMARY OF EVIDENCE ADDUCED**

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

11. The Complainant, lodged this complaint on behalf of a minor J.A.A (hereinafter as 'the Minor') in her capacity as the parent of the said Minor.
12. The Complainant stated that in the year 2019, she enrolled the Minor at the Respondent's school, but later transferred her to another school in the year 2021.
13. The Complainant averred that on 15<sup>th</sup> May 2022, she discovered that an image of the Minor had been displayed on a billboard erected at Makutano town along the Nairobi-Nyeri Road, without her consent. The billboard was advertising the Respondent's school.

14. Additionally, the Complainant discovered that there was a similar billboard containing the image of the Minor that had been erected in Eldoret town without her consent. The Complainant provided a photo of the billboards erected in Makutano and Eldoret as proof.
15. The Complainant stated that she also uncovered that the Minor's image had been displayed on the Respondent's website without having obtained her consent.
16. The Complainant averred that she was never informed of any intention of the Respondent to use the Minor's image for commercial advertising. Further, her consent as the parent of the minor was not sought prior to the processing and erecting the Minor's photograph on the billboards for the purposes of advertising the Respondent's school.
17. The Complainant stated that she issued a demand letter to the Respondent dated 18<sup>th</sup> May 2022 and the Respondent proceeded to pull down the impugned images of the Minor appearing on its website and on the billboards at Makutano and Eldoret town. The Complainant provided a copy of the said demand letter as proof.
18. The Complainant stated that the publication of the Minor's image without consent constitutes a violation of personality rights, which encompasses the exclusive right of an individual to market, control and profit from the commercial use of her name, image, likeness and persona.
19. As a result, the minor has been subjected to humiliation and embarrassment as the publication of the Minor's image on the billboards alluded to the insinuation that the Minor was still a student at or affiliated with the Respondent's school, yet she had been transferred a year before from the school.
20. In addition, the Minor incurred economic loss owing to the fact that the Respondent School used her image absent of consent, thereby positioning themselves for admission of more students and financial gain on their part without any recompense to the minor.

21. In conclusion, the Complainant sought the following remedies: -

- i) A declaration that the Respondent contravened sections 26, 27(a), 29, 30(1)(a), 30(1)(b)(viii), 30(3), 33,37 and 65 of the Act and Regulations 4, 6(2) and 14 of the Data Protection (General Regulations) 2021.
- ii) A declaration that the Respondent violated the Minor's right to dignity, privacy, publicity and personality rights.
- iii) Appropriate sanctions against the Respondent for violations of the Act and the Data Protection (General) Regulations 2021.
- iv) An order for compensation to the tune of Kshs. 4,500,000 being damages caused by the Respondent's violations of the Act and the attendant Regulations.

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

22. The Respondent stated that the Complainant first wrote to them regarding the image(s) subject of the Complaint on or about 18<sup>th</sup> May 2022.
23. The Respondent stated that it had made it clear that the Complainant had expressly consented twice to the use of the Minor's image in the Respondent's promotional material, including its website and print media. The Respondent stated that it shall demonstrate as much in its substantive response to the Complaint. No further response or substantive response was provided by the Respondent to this Office.
24. The Respondent averred that it pulled down the two billboards in question and the impugned image on its website to facilitate a further discussion on an amicable resolution of the Complainant's grievances. Subsequently, the Respondent made the Complainant an offer to pay for the use of the image at market rates, but the Complainant neither responded to nor accepted the said offer. The Respondent is therefore surprised to learn that the Complainant has filed a complaint with this Office.

## **F. INVESTIGATIONS UNDERTAKEN**

25. This Office reviewed the complaint as lodged, the Respondent's response, and all the supporting documents provided by the Complainant.
26. Investigation Officers from this Office also visited the alleged locations where the billboards in question were located (along the Nairobi - Nyeri Road at Makutano and at the Respondent's School located in Eldoret Town), and confirmed that the billboards had been pulled down.
27. Investigation Officers also visited the Respondent's website and confirmed that the Minor's image was pulled down and was no longer available for viewing.

## **G. ISSUES FOR DETERMINATION**

28. It is not in contention that the Respondent used the Minor's image for commercial purposes, by putting it up on billboards and on its website.
29. In light of the above, the following issues fall for determination by this Office:
- i. Whether the Respondent obtained parental consent from the Complainant to process the personal data of the Minor;
  - ii. Whether there was an infringement of the Minor's rights under the Act;
  - iii. Whether the Respondent fulfilled its obligations under the Act; and
  - iv. Whether the Minor is entitled to any remedies under the Act and the attendant Regulations.

## **I. WHETHER THE RESPONDENT OBTAINED PARENTAL CONSENT FROM THE COMPLAINANT TO PROCESS THE PERSONAL DATA OF THE MINOR**

30. The Complainant stated that Respondent did not seek prior consent, from her as the parent of the Minor, before using the Minor's image for the purpose of advertising the Respondent's School.
31. On the other hand, the Respondent stated that the Complainant had expressly consented twice to the use of the Minor's image in its promotional material.

The Respondent further stated that it shall demonstrate the above in its substantive response to the Complaint but it never submitted a further/substantive response.

32. Section 33(1)(a) of the Act states, "*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.*"

33. Section 32(1) of the Act states that, "*a data controller or a 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.*" This burden has not been discharged by the Respondent as it did not provide evidence to prove that it obtained consent to process the Minor's personal data from the Minor's parent or guardian.

34. Further, the Respondent did not prove that it satisfied the reasons set out in Section 30(1)(b) that allow for the processing of personal data without obtaining consent from the data subject.

35. From the above, this Office finds that the Respondent did not obtain parental consent before processing the Minor's personal data.

## **II. WHETHER THERE WAS AN INFRINGEMENT OF THE MINOR'S RIGHTS UNDER THE ACT**

36. It is important to note that minors have the same rights as adults over their personal data. Additionally, a person that has parental authority or a guardian can exercise the rights conferred on a minor on their behalf.

37. Section 26(a) of the Act provides for the right of a data subject to be informed of the use to which their personal data is to be put. The Respondent did not inform the Complainant, as the holder of parental responsibility, that her child's image was going to be used for market purposes on two billboards and on the Respondent's website before processing the child's personal data. This was a violation of the Minor's right to be informed.

38. Section 40(1)(b) of the Act provides for the right of erasure and states 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.”*

39. The Complainant exercised the Minor's right of erasure by issuing a demand letter dated 18<sup>th</sup> May 2022 to the Respondent. The Respondent in compliance with the request proceeded to pull down the two billboards and the images of the Minor published on its website. By so doing, the Respondent upheld the Minor's right of erasure of her personal data.

40. From the foregoing, this Office finds that the Complainant's right to be informed was violated by the Respondent. The Respondent however upheld the Minor's right of erasure of her personal data.

### **III. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT;**

41. The Respondent is a data controller within the definition of the Act and therefore has obligations pursuant to the Act.

42. The Respondent had an obligation under Section 25 of the Act to ensure that the Minor's personal data is, amongst others:

- i. processed in accordance with her right to privacy;
- ii. processed lawfully, fairly and in a transparent manner in relation to the Complainant;
- iii. collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes; and
- iv. collected only where a valid explanation is provided whenever information relating to private affairs is required.

The Respondent contravened the above principles of data protection by not adhering to the same while processing the Minor's personal data.

43. Section 29 of the Act provides an obligation to data controllers or data processors of the duty to notify the data subject. Notably, the data subject has to be informed of, *inter alia*;

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- i. rights specified under Section 26;
- ii. the fact that personal data was being collected;
- iii. the purpose of collection of their personal data;
- iv. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

The Respondent had a duty to notify the Complainant of the Minor's rights under the Act, the fact that it had collected her image and was going to use it for marketing purposes, and the measures it had in place to ensure safety of the Minor's personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

44. Section 30 of the Act gives instances where a data controller or data processor can lawfully process personal data. It states that, "*a data controller or data processor shall not process data unless the data subject consents to the processing for one or more specified purposes or the processing is necessary for the reasons given in subsection (b).*" The Respondent failed to provide proof of having obtained parental consent to process the Minor's personal data. Further, the Respondent did not prove that it satisfied the reasons outlined in Section 30(1)(b) that allow for the processing of personal data without obtaining consent from the data subject.

45. Section 37(1) of the Act stipulates that personal data obtained under the Act cannot be used for commercial purposes without obtaining **express consent** from the data subject. The Respondent failed to demonstrate that it obtained express consent from the Minor's parent to use her personal data for commercial purposes, thus violating this provision of the Act.

46. From the foregoing, this Office finds that the Respondent did not fulfil the above obligations as set out under the Act and the attendant Regulations.

#### **IV. WHETHER THE MINOR IS ENTITLED TO THE REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS**

47. Pursuant to Regulation 14(2) of the Enforcement Regulations, a determination shall state the remedy to which a complainant is entitled.

Further, the remedies are provided for in Regulation 14(3) of the Enforcement Regulations.

48. The Complainant sought for a declaration that the Respondent contravened sections 26, 27(a), 29, 30(1)(a), 30(1)(b)(viii), 30(3), 33, 37 and 65 of the Act and Regulations 4, 6(2) and 14 of the Data Protection (General) Regulations 2021. In addition, Complainant also sought for a declaration that the Respondent violated the minor's right to dignity, privacy, publicity and personality rights. A declaration is not one of the remedies provided for under Regulation 14(3) and therefore this Office has no power to issue one. Therefore, the prayer for the above declaration is hereby denied.

49. Having found that the Respondent violated the Complainant's rights provided for under the Act and did not fulfil its obligations provided for under the Act, **an enforcement notice shall be issued to the Respondent.**

50. The Complainant also prayed for compensation to the tune of Kshs. 4,500,000 being damages caused by the Respondent's violations of the Act and the attendant Regulations.

51. 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."*

52. Section 65(4) of the Act states that, *"damage includes financial loss and damage not involving financial loss, including distress."*

53. 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.

54. In considering whether to issue compensation, this Office takes into consideration the fact that the complaint is in respect of use of a minor's personal data for commercial purposes without consent from the parent or guardian. Personal data belonging to minors requires special protection due

their vulnerability and should always advance the rights and best interests of the child.

55. Further, the Office considers the fact that the Respondent either intentionally or negligently violated the Minor's right to be informed of the use to which her personal data was to be put.

56. While the Office finds that the Minor's image was used for commercial purposes and her rights under the Act were violated, it declines to award the Complainant Kshs 4,500,000 as prayed for, as the amount is so inordinately high and an erroneous estimate of the damage. The Office hereby orders the Respondent to pay the Complainant **Kenya Shillings nine hundred and fifty thousand (KES. 950,000)** as compensation for the violation of the Minor's rights under the Act and for the use of the Minor's personal data for commercial purposes without the Complainant's express consent.

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

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

- i. The Respondent is hereby found liable for violating the Minor's right to be informed of the use to which her personal data would be put and for using her personal data for commercial purposes without obtaining express consent from the Complainant.
- ii. An enforcement notice to hereby issue against the Respondent.
- iii. The Respondent is hereby **ordered to pay the Complainant Kenya Shillings nine hundred and fifty thousand (KES. 950,000)** 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 21<sup>st</sup> day of June 2024.



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

