



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1069 OF 2024

NICK ONGERI MAIRURA..... COMPLAINANT

-VERSUS-

KABRAS SUGAR RUGBY FOOTBALL CLUB1ST RESPONDENT

KABRAS RUGBY CLUB.....2ND 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 Respondents used his image commercially to market and advertise a rugby match between the Respondents and KCB Rugby Football Club that was to be held sometime in 18th February 2023.

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. The Office received a complaint dated 11th July, 2024 by Nick Onger Mairura (hereinafter 'the Complainant'), on 15th July 2024, pursuant to Section 56 of the Act and Regulation 4 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter the 'Enforcement Regulations') from the Complainant who is the aggrieved data subject.
6. From the Complainant lodging form, Form DPC 1, the Complainant had cited the 1st Respondent as the Respondent.
7. Pursuant to Regulation 11 of the Enforcement Regulations, on 19th and 22nd July 2024, this Office through e-mail and physically by hand delivery notified the Respondent of the complaint filed against it *vide* a letter dated 18th July 2024 referenced ODPC/CONF/1/5 VOL II (47) and required their response within 21 days.
8. The 2nd Respondent, through their Advocates, responded to the notification of the complaint letter *vide* email on 27th August 2024 attaching an undated letter referenced OOS/GEN/KAB/01.
9. On the said letter referenced OOS/GEN/KAB/01 and sent through e-mail on 27th August 2024, the 2nd Respondent contended that the Complainant had brought action against a wrong and non-existent party, Kabras Sugar Rugby Football Club. They stated that they were registered as Kabras Rugby Club and not Kabras Sugar Rugby Football Club as cited by the Complainant in his Complaint Form DPC 1.

They produced a copy of the certificate of registration of Kabras Rugby Club to support their assertions.

10. On 6th September 2024, based on the above assertions and upon confirming the said position, the Data commissioner exercising her powers as envisaged under Regulation 12(1) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 enjoined the 2nd Respondent, Kabras Rugby Club, as a respondent in this matter.
11. Regulation 12 (1) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations 2021 provides that where it appears to the Data Commissioner, or by application by either the Complainant or the Respondent, that it is necessary that a person becomes a party to a complaint, the Data Commissioner may order that person to be enjoined as a party. [Emphasis supplied].
12. The decision to enjoin the 2nd Respondent, Kabras Rugby Club, as a Respondent in this matter was communicated to it on 9th September 2024. On the said Notice to enjoin, the complaint was attached and the 2nd Respondent was required to respond to the Complaint within 21 days.
13. On 10th September 2024, the 2nd Respondent through their advocates contested its joinder stating that they were not served by any application for joinder from the Complainant.
14. On the same date, 10th September 2024, the Data Commissioner responded to the 2nd Respondent stating that the joinder of the 2nd Respondent was by the Data Commissioner as provided in Regulation 12(1) above. Additionally, Section 61 of the Act which provides for obstruction of the Data Commissioner was brought to the attention of the 2nd Respondent.
15. As at the date of this determination, the 1st and 2nd Respondents ('the Respondents') have never provided any substantive response and/or defence to the allegations brought against them despite being notified and given an opportunity to do so.

16. This determination is therefore a result of analysis of the complaint as received, and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

I. COMPLAINANT'S CASE

17. It is the Complainant's case that on or about 14th February 2023, the Respondents caused to be published in their social media platforms (Facebook and Instagram) a poster bearing the Complainant's photograph with the caption "*Top of the table contest that you all have been waiting for. We head to Ruaraka this weekend to face log leaders KCB*"
18. The Complainant states that he was surprised when he started seeing posters bearing his photograph published by the Respondents on their social media platforms prominently and clearly showing his image while dressed in the uniform of KCB Rugby Football Club.
19. The Complainant contended that the said photographs were posted by the Respondents without his knowledge, consent or authority. He further stated that the said photographs were posted as a strategy by the Respondents to market and advertise the rugby match that was scheduled for 18th February 2023 between KCB Rugby Football Club and Kabras Sugar Rugby Football Club at the Ruaraka Sports ground. To the Complainant, the photographs were used for the sole purpose of generating commercial and financial gain to the Respondent.
20. The Complainant further contended that the said photographs erroneously portrayed him as a player for KCB Rugby Football Club. However, at the time of publication of the said photographs in February 2023, the Complainant had ceased playing for KCB Rugby Club and was at the time playing for Strathmore University Rugby Football Club.
21. The Complainant further stated on 11th February 2023, which was just 3 days before the unlawful publication of his photograph by the Respondent, his then rugby team being Strathmore University Rugby Football Club, played against the Respondents at Kakamega show grounds, and the Complainant was one of the

players who represented Strathmore University Rugby Football Club in the said match.

22. The Complainant contended that the publication of his photographs by the Respondent being made a few days after the Respondents' encounter with Strathmore University Rugby Football Club, depicted that the Complainant was working in partnership with KCB Rugby Football Club as its player and/or brand ambassador. To the Complainant, this publication made him appear disloyal and untrustworthy to his then rugby team being Strathmore University Rugby Football Club and caused him to receive negative criticism and to be shunned away by his peers in the rugby fraternity.
23. The Complainant stated that the above publication of his photographs by the Respondent being made a few days after the Respondents' encounter with Strathmore University Rugby Football Club, depicted that he was working in partnership with KCB Rugby Football Club as its player and/or brand ambassador. He also stated that the said publications made him appear disloyal and untrustworthy to his then Rugby team being Strathmore University Rugby Football Club and caused him to receive negative criticism and to be shunned away by his peers in the rugby fraternity.
24. The Complainant averred that the actions and omissions of the Respondents, by themselves or through their agents and/or representatives in publishing the Complainant's photograph on its social media platforms without his consent constituted breach of the Complainant's constitutional and statutory rights.
25. Further, the Complainant stated that with the exercise of reasonable diligence and care, the Respondents would have known or ought to have known that he was no longer playing for KCB Rugby Football Club, and that the use of the said photograph was not relevant or appropriate in the circumstances.
26. The Complainant contended that on 17th February 2023, through his advocates, he wrote a demand letter to the Respondents to cease and desist from publishing the Complainant's image and photographs on its social media platforms and to compensate the Complainant for the unlawful use of his image.

27. That despite demand and notice of intention to sue being given, the Respondents has deliberately failed and/or neglected to make good the Complainant's claim, neither has the Respondents issued an apology to the Complainant for infringement of his rights, thus necessitating lodging of this Complaint.

II. RESPONDENTS' CASE

28. Apart from contesting the legality of the joinder of the 1st Respondent to this complaint and the Data Commissioner's decision to enjoin the 2nd Respondent to this Complaint, as stated earlier herein, the Respondents never proffered any response to the Complainant's allegations despite being given an opportunity to do so. To date, they have remained non-responsive to the Complaint.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

29. As part of his evidence, the Complainant adduced

- i) Certified copy of the Complainant's National Identity Card;
- ii) Screenshot of a poster bearing the Plaintiff's photograph and posted on the Respondents' official Facebook Account Known as *Kabras Sugar Rugby* with the caption "*Top of the table contest that you all have been waiting for. We head to Ruaraka this weekend to face log leaders KCB.*"
- iii) Screenshot of a poster bearing the Plaintiff's photograph and posted on the Respondents' official Instagram Account Known as *Kabrassugarrfc* with the caption "*Top of the table contest that you all have been waiting for. We head to Ruaraka this weekend to face log leaders KCB.*"
- iv) Email correspondence from the Complainant and KCB Rugby Football Club dated 12th August 2021.
- v) Email correspondence from the Complainant and KCB Rugby Football Club dated 23rd May 2022.

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- vi) Screenshot of poster by the Respondent dated 9th February 2023 on advertisement of the match between Strathmore RFC and Kabras Sugar RFC scheduled for 11th February 2023.
- vii) Demand letter from the Complainant's Advocates dated 17th February 2023 to the Respondents and proof of service.
- viii) Copy of the Complainant's recent photograph.

F. ISSUES FOR DETERMINATION

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

- i. Whether the complaint is defeated by misjoinder;
- ii. Whether the Complainant is identifiable from the publication;
- iii. Whether the Complainant's personal data was lawfully processed;
- iv. Whether there was a violation of the Complainant's rights; and
- v. Whether the Complainant is entitled to any remedy under the Act.

G. ANALYSIS AND DETERMINATION

I. WHETHER THE COMPLAINT IS DEFEATED BY MISJOINDER

31. This Office notes from the onset that whereas the Complainant filed the complaint was against the 1st Respondent (Kabras Sugar Rugby Football Club), it is the 2nd Respondent (Kabras Rugby Club) which is the duly registered Sports Club that operated the Facebook page 'Kabras Sugar Rugby' & Instagram page 'kabrasrugarrfc' where the impugned images were published.

32. In its letter ref OOS/GEN/KAB/01, the 2nd Respondent admitted that there is no club known as Kabras Sugar Rugby Football Club. The 2nd Respondent further attached a copy of the certificate of registration of Kabras Rugby Club issued under Section 47(1) of the Sports Act by the Sports Registrar confirming that it is indeed the 2nd Respondent that is registered as a Sports Club.

33. It is trite that no suit shall be defeated by reason of the misjoinder or non-joinder of parties. The Complainant's misjoinder of the 1st Respondent as a party to this suit ought not defeat the complaint.

34. This finding is further grounded in Regulation 12 (1) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations 2021 provides that where it appears to the Data Commissioner, or by application by either the Complainant or the Respondent, that it is necessary that a person becomes a party to a complaint, the Data Commissioner may order that person to be enjoined as a party. [Emphasis supplied].

35. Needless to emphasize Article 159(2)(d) of the Constitution of Kenya, 2010 provides that "Justice shall be administered without undue regard to procedural technicalities."

36. This Office therefore finds that the misjoinder of the 1st Respondent does not render the complaint inadmissible. The 2nd Respondent is the proper party to whom rights and obligations arising from the complaint attach.

II. WHETHER THE COMPLAINANT IS IDENTIFIABLE FROM THE PUBLICATION

37. The Act at Section 2 identifies an "identifiable natural person" as :-

"a person who can be identified directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social or social identity"

38. The Act goes further to define "personal data" as *any information relating to an identified or identifiable natural person.*

39. From the evidence attached to the complaint, there are two male persons appearing on the 2nd Respondents' posters, posted on their social media platforms on the various dates as pleaded by the Complainant.

40. The Complainant is identifiable as one of the male persons in the posters posted by the 2nd Respondent. The Complainant is therefore an identifiable natural person as defined in the Act.

41. As such, this Office finds that the Complainant can be identified from the 2nd Respondent's publications.

III. WHETHER THE COMPLAINANT'S PERSONAL DATA WAS LAWFULLY PROCESSED

42. It was the Complainant's position that the Respondents used his image to market and or advertise for the Respondents' games without his knowledge, consent or authority.

43. Section 37 of the Data Protection Act provides that 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 a data subject; or 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.

44. 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]

45. From a collective reading of the above legal provisions, it is discernible that any form of showcasing, influencing, and/or advancing a commercial transaction whether directly or indirectly using personal data amounts to the commercial use of personal data.

46. From the posters adduced, it is evident that the 2nd Respondent was advertising and/or marketing their next match that was to be held on 18th February 2023. They were inducing the public to attend the match for commercial and economic gain.

47. This constituted commercial use of personal data which required the consent of the data subject, the Complainant in this case.

48. The 2nd Respondent did not provide a response to this assertion. The Complainant's position remains uncontroverted.

49. The Office therefore finds that the use of the Complainant's personal data for commercial purposes was unlawful and contravened the Act.

IV. WHETHER THERE WAS A VIOLATION OF THE COMPLAINANT'S RIGHTS

50. It was the Complainant's position that by the Respondents' actions of using his photograph without his knowledge, consent or authority violated his rights to be informed, to correction of false or misleading and to deletion of false or misleading data about them.

51. Section 26 of the Act provides for a data subjects rights as follows:-

26. Rights of a data subject

A data subject has a right:-

- a) to be informed of the use to which their personal data is to be put;*
- b) to access their personal data in custody of data controller or data processor;*
- c) to object to the processing of all or part of their personal data;*
- d) to correction of false or misleading data; and*
- e) to deletion of false or misleading data about them.*

52. Having found that the 2nd Respondent used the Complainant's personal data without his knowledge and consent, it therefore follows that he was not informed that his personal data would be used by the Respondents' in the manner they used it.

53. As to the right to correction and deletion of false or misleading data, this Office notes that the same has been effected. From our investigations and as at the date

of this determination, the impugned posters are no longer on the 2nd Respondent's platforms.

54. The Office therefore finds that the 2nd Respondent violated the Complainant's right to be informed of the use to which their personal data is to be put enshrined in Section 26(a) of the Act.

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

55. 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.

56. Having considered the merits of the Complaint, the evidence adduced by both the Complainant, and having found that the 2nd Respondent did not process the Complainant's personal data in accordance with the law, it, therefore, follows that there has been a violation of the Act by the 2nd Respondent.

57. 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.

58. 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.

59. The Complainant claimed for the remedy of compensation against the Respondents. The 2nd Respondent did not make any representations concerning the Complainant's claim and/or prayers for compensation.

60. The 2nd Respondent is hereby directed to compensate the Complainant the amount of **KES. 750,000/= (Seven Hundred and Fifty Thousand Shillings Only)** for unlawful use and processing of the Complainant's personal data and violation

of the Complainant's right to be informed of the use to which his personal data would be put.

H. FINAL DETERMINATION

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

- i. The 2nd Respondents are hereby found liable.
- ii. The 2nd Respondent is ordered to Compensate the Complainant **KES 750,000/= (Seven Hundred and Fifty Thousand Kenya Shillings)**.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 11th day of October 2024



Immaculate Kassait, MBS
DATA COMMISSIONER