



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 0561 OF 2024**

**TOIVO KIAI MUHUGA.....COMPLAINANT**

**-VERSUS-**

**TALANTA INSTITUTE.....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. The Office received a complaint on 18<sup>th</sup> March 2024 alleging the unauthorized posting, publication and commercial use of the Complainant’s image by the Respondent on their social media platforms and sponsored advertisements without obtaining his prior 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 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.
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 18<sup>th</sup> March 2024. The complaint was lodged pursuant to Section 56 (1) of the Act and Regulation 4 (3) (b) of the Enforcement Regulations by the Complainant's advocates acting on his behalf.
7. As per Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *via* a letter dated 16<sup>th</sup> April, 2024 referenced **ODPC/CONF/1/5 VOL 1 (932)**. In the notification of the complaint, the Respondent was to provide: -
  - 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 contractual agreement between themselves and the Complainant, if any;
  - d. Evidence as to whether the Complainant consented to the use of their personal data for promotional purposes;
  - e. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;

- f. The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again, if any;
  - g. Any other information they wish the Office to consider.
8. The Respondent served its initial response to this Office through a letter dated 8<sup>th</sup> May 2024 and its second response through email on 21<sup>st</sup> May 2024.
9. This determination is therefore pegged on the provisions of 14 of the Regulations which state that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

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

10. The Complainant stated that he worked at the Respondent's institute as a tutor in 2017 when the Respondent took videos of him while he was teaching.
11. He alleged that the Respondent did not seek his consent to take the videos and did not inform him that they would use the footage for marketing purposes.

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

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

12. The Complainant filled the complaint form DPC 1 as per the Enforcement Regulations. He stated that the Respondent took videos of him while he was a tutor at the institute without his consent.
13. This Office requested the Complainant to confirm whether he reached out to the Respondent to exercise his rights. The Complainant stated that a demand letter was sent to the Respondent asking them to cease and desist using the Complainant's image in marketing and advertising themselves without his consent.
14. The Complainant availed a demand letter dated 27<sup>th</sup> March 2024 as proof of the same, notably after the complaint was lodged to this Office and without any proof of service.

15. The Complainant alleged that he since saw adverts of the Respondent in various productions by the institute that were posted on YouTube, the most recent one being a short film by a third party. They provided the link to the said video.
16. The Complainant pointed out several violations of Sections 26, 29, 30 and 37 of the Act.
17. The Complainant also cited several determinations rendered by this Office to support his complaint against the Respondent. He cited the complaint against *Roma School* which, according to his interpretation, underscored the essential requirement of obtaining explicit consent from parents or guardians before processing of data related to minors. He also cited *Abdinur Kassim & anor vs Joyce Njoki Ngugi T/A Kora Spa* where the Respondent did not satisfy the provisions of Section 37 (1) of the Act with regards to using personal data for commercial purposes.
18. The Complainant prayed for financial compensation as he was not a model contracted by the Respondent to use his images for financial gain. He also requested the Respondent to immediately remove the video from all social media platforms, sponsored adverts and promotional material, a written acknowledgement of the breach of the Act and a commitment to comply with the law in future.

**ii. THE RESPONDENT'S RESPONSE**

19. The Respondent responded to the notification of complaint *vide* a letter dated 8<sup>th</sup> May 2024 and stated as follows;
20. That the Complainant was employed by themselves in 2017 as a trainer where his role among others was to teach the students admitted in the institution Information and Communications Technology.
21. That there were live classes on photography and videography as well as film classes which saw that students take certain props for them to master their skills and perfect them. Additionally, for marketing purposes, they often record videos and take photographic evidence of their work for promotional purposes. The video where the Complainant was featured was of such nature.

22. Section 30 (1) (b) (i) of the Act states that "personal data processing is necessary; for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject before entering into a contract."
23. Every video that was taken and promoted arose from the virtue of the Complainant being a trainer and the work needed to be referenced for others to see the value of their institution and the trainers therein.
24. They always informed the concerned parties whenever any photographs or videos were taken for promotional purposes. The Complainant consented to the said video which was taken for promotional purposes without any commercial or monetary gain attached to it. The Complainant was fully aware when the said video was taken and it has been posted since 2017. It is disreputable of the Complainant to complain being featured in the video 8 years later yet it had been doing its rounds ever since.
25. That the said data was processed lawfully, fairly and in a transparent manner in relation to any person who was part of the video. However, the Respondent corrected his displeasure in being featured in the videos any further by blurring, erasing and deleting any feature of the Complainant from the said promotional video and any other that he might have been.
26. That according to the Act, the meaning given to "personal data breach" does not in any way attach to the Complainant as there was no accidental, unlawful or unauthorized processing or disclosure of any data that would occasion a breach of privacy and neither does the same evoke any loss to the Complainant. Seeking for compensation therefore is exploitative.
27. In the spirit of Section 40 as read together with Regulation 10 and 12 of the General Regulations on the rectification and erasure, they stated that every video or image that contained the Complainant's video or image has been corrected with no trace as to his image or presence.

## **F. INVESTIGATIONS UNDERTAKEN**

28. Owing to the mandate of this Office to receive and investigate any complaint by any person on infringements of the rights under the Act and the powers conferred upon this Office under Section 9 (1) (a) of the Act to conduct investigations on the basis of a complaint made by a data subject, it was imperative to request further information from the Respondent based on their response.

29. This Office asked them to furnish it with;

- i. proof that the Complainant consented to his video being used in the promotional video;
- ii. the contractual agreement between themselves and the Complainant; and
- iii. any other relevant information that they would wish the Office to consider.

30. On the first issue, the Respondent stated that as a matter of policy in the Institution, it is guaranteed that certain promotional videos are documented to enhance the credibility of the institution given that its main or most known courses are Film, Photography and Videography and now Digital Marketing. In 2017, there was no requirement for institutions or any individuals to have their employees or otherwise sign consent forms and having been made aware of the intricacies that surrounded the institution, the Complainant became agreeable to it, as did all others shown in the video.

The Complainant was fully aware and was made aware during induction of how the institution runs and as seen in the video, he or any other person were not coerced or under duress to appear in the said promotional video, as it was just a part of him fulfilling his contractual duties. They are therefore protected by Section 30 (1) (b) (1) of the Act as well as the definition of the Personal Data Breach as defined by the same Act.

31. On the second issue, the Respondent stated that they have moved buildings too many times since 2017 and could therefore not locate the signed copy of Mr. Toivo's contract which they are certain is in his possession. However, the Respondent opines that the Complainant's contractual agreement with them

should not be in question as it can be seen that he proudly associates with the Respondent on his social media with an exact timeline of when he started and ended his contract with them. The Respondent shared the Complainant's LinkedIn profile link as proof of the same.

32. On the third issue, the Respondent stated that the Complainant knew of the existence of the said video for over 8 years and has never brought in a complaint until when he assumed that it was commercialized after being posted by a well-known public figure. This is not only cunning but in bad faith as he had never had an issue with its circulation in all the 8 years while it did rounds on all social media.

The Respondent also indicated compliance with Section 40 of the Data Protection Act shows its good faith and dedication in ensuring that as an institution it respects the privacy and data of others as well as comply with the Data Protection laws and any other Statutes. Given that no commercialization was done and neither did the Complainant occasion any financial loss due to the latest video, the compliance with Section 40 is sufficient.

33. The Respondent shared a soft copy of an unsigned contract allegedly between them and the Respondent.

34. Upon further investigations, this Office found that the Complainant's video was indeed posted by a third party. A screenshot of the video was taken on 26<sup>th</sup> March 2023. However, after the Respondent's response, a further confirmation as to whether the video was still up on the third party's page was not possible as the third party had made his YouTube page private.

35. This Office then investigated the Respondent's Facebook page and found the same video was posted on 5<sup>th</sup> January 2018 and is still there as at the date of this determination. The Respondent's Facebook page has 100,000 followers and the post containing the Complainant's image attracted 118 likes, 3 comments and was viewed by 15,000 people.

## **G. ISSUES FOR DETERMINATION**

36. Following the evidence provided by both parties and the investigations conducted by this Office, the following issues fall for determination by this Office:

- i. Whether there was an infringement of the Complainant's rights under the Act;
- ii. Whether the Respondent fulfilled its obligations under the Act; and
- iii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

**I. WHETHER THERE WAS AN INFRINGEMENT OF THE COMPLAINANT'S RIGHTS UNDER THE ACT**

37. The Complainant is a data subject within the definition of the Act has rights under Section 26 (a) of the Act to be informed of the use to which his personal data was to be put. However, when the video containing his image was recorded, the Act was not enacted at the time and therefore the right to be informed could not then be exercised as stipulated in the Act.

38. However, under Section 26 (e), the Complainant had the right to deletion of false or misleading data about him. This is applicable because the Complainant was exercising this right after the enactment of the Act and the Respondent continued to use his image after he left employment.

39. Section 40 (1) (b) of the Act also provides for the right of rectification and erasure and states that a data subject may request a data controller or data processor to erase without undue delay personal data that the data controller or processor is no longer authorised to retain.

40. Further, Regulation 12 (1) (a) and (b) of the Data Protection (General) Regulations, 2021 (the 'General' Regulations) provides that;

*pursuant to Section 40 (1) (b) a data subject may, request a data controller or processor to erase or destroy personal data held by the data controller or processor where;*

*a) the personal data is no longer necessary for the purpose which it was collected; and*

*b) where the data subject withdraws their consent that was the lawful basis for retaining the personal data.*

41. The Complainant availed a demand letter dated 27<sup>th</sup> March 2024 which he allegedly served the Respondent demanding them to take down all videos that contained his image from all their platforms. However, there was no proof that the demand letter was served upon the Respondent to take the necessary actions and therefore this Office cannot hold the Respondent liable under Section 40 of the Act and Regulation 12 of the General Regulations.
42. That notwithstanding, the notification of complaint from this Office would have prompted the Respondent to pull down the videos containing the Complainant's image from their platform. The Facebook post is still up as at the date of this determination and therefore, there is a continuous infringement of the Complainant's rights.
43. Section 32 (1) of the Act provides for the conditions of consent and states that 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.
44. The Respondent stated that it obtained oral consent from the Complainant to post the videos containing his image while he was working for them. Much as this was in 2017 before the enactment of the Act, it is a continuous infringement as the video on their Facebook continues to be posted till date and there is no proof that there was consent to continue using his image after his employment.
45. Sub-section (2) of Section 32 states that unless otherwise provided in the Act, a data subject shall have the right to withdraw consent at any time.
46. In this complaint, the Complainant no longer wanted the videos containing his image to be posted on any of the Respondent's social media pages and therefore exercised his right and requested the Respondent to pull down the said videos.
47. It is noteworthy that as at the date of this determination, the Respondent has still not pulled down the Complainant's image from its Facebook page since

2018. The moment the Act was enacted and in force, the Respondent had an obligation to adhere to the provisions of the Act which it did not up until this complaint was lodged.

**II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT;**

48. Section 37 (1) (a) of the Act provides for commercial use of data and 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.

49. The Respondent failed to prove that it sought and obtained express consent from the Complainant to continue to publish a video containing image on its social media pages. The Respondent should have obtained fresh consent after the Complainant stopped working for them to continue to use his image in their videos in light of the provisions of the Act.

50. Interpretation of commercial purposes is provided for under Regulation 14 of the General Regulations which states that:

*I. 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.*

51. In the video containing the Complainant's image posted on YouTube it was indicated:

*"INTAKE ONGOING."*

52. This caption fits into the interpretation of the use of personal data for commercial purposes for which the Complainant's consent was required.

53. The Complainant also indicated an infringement under Section 29 of the Act which provides for the duty of a data controller or data processor to, before

collecting their personal data, inform the data subject of the various factors listed thereunder. However, this Office takes cognisance of the fact that when the Complainant's personal data was collected, the Act was not enacted and therefore, the Respondent cannot be found liable based on this provision.

54. This Office therefore finds that the Respondent violated the Complainant's rights under Sections 26 (e) and 32 of the Act, and failed to fulfil its obligations under Section 37 of the Act as read with Regulation 14 of the General Regulations.

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

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

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

- a. Issuance of an enforcement notice to the respondent in accordance with the Act and the Regulations;*
- b. Issuance of a penalty notice imposing an administrative fine where a respondent fails to comply with the enforcement notice;*
- c. Dismissal of the complaint where it lacks merit;*
- d. Recommendation for prosecution;*
- e. Or an order for compensation to the data subject by the 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) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

59. In view of the foregoing, this Office concludes and finds that the Complainant is entitled to compensation pursuant to Section 65 of the Act and Regulation 14 (3) (e).

60. In considering the Complainant's rights infringed by the Respondent, the continuous infringement of the Complainant's image as at the date of this determination, and the use of his image for commercial purposes, the Respondent is hereby ordered to compensate the Complainant KES 750,000 (Seven Hundred and Fifty shillings only).

61. Further, pursuant to Regulation 14 (2) (e) of the Enforcement Regulations, the Complainant is directed to delete the video containing the Complainant's image from its Facebook page and delete all his records in their possession.

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

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

- i. The Respondent is hereby found liable for using the Complainant's image for commercial gain without his consent and failing to pull down the said image upon the Complainant's request hence violating his rights under the Act;
- ii. The Respondent is ordered to compensate the Complainant **KES 750,000 (Seven hundred and fifty thousand shillings only)**.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

**DATED** at **NAIROBI** this 30<sup>th</sup> day of June 2024.



---

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