



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0581 OF 2024

INGA KIMARU.....COMPLAINANT

-VERSUS-

AMREF PENSION TRUSTEES.....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 16th April 2024 that the Respondent shared her personal details to third parties.

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 16th April 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 29th April, 2024 referenced **ODPC/CONF/1/5 VOL 1 (955)**. 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 lawful basis relied upon to disclose her pension details to the Sacco, if any;
 - d. Whether the Complainant was notified and consented to the disclosure of her pension details;
 - e. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;

- g. Any other information they wish the Office to consider.
8. The Respondent served its responses to this Office through letter dated 16th May 2024 and 24th May 2024. In their responses, the Respondent requested to resolve the complaint through mediation pursuant to the alternative dispute resolution mechanisms outlined in the Act and the Regulations.
9. The parties therefore attempted to mediate and settle the complaint facilitated by this Office as per Section 9 (c) of the Act, however, the mediation was unsuccessful thereby necessitating the complaint to be determined as per Regulation 15 (8) of the Enforcement Regulations.
10. 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

11. The Complainant stated that she was employed by AMREF Kenya where she was a member of AMREF Sacco. Upon leaving, she made an application for her pension via email to the human resource (HR) officer at AMREF who sent her a form which she filled and sent back for processing.
12. She then instructed the HR officer on where the transfer should be made. She then received a call from one of her guarantors whose office is located in the same compound as AMREF regarding follow up on her payments. She was then again called by the sacco credit officer informing her that they were aware that she was getting a lump sum payment from her pension.
13. Upon inquiry as to how they got this information, the officer told her that one of the pension trustees had disclosed this information.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

14. The Complainant filled the complaint form DPC 1 as per the Enforcement Regulations. As per her narration of the complaint, she called the officer who she was dealing with at the insurance to inform him that her pension information had been leaked by a trustee. He told her that that was a violation of the confidentiality clause that trustees are supposed to observe. He assisted her in drafting a cease-and-desist letter to send to those involved.
15. She alleged that the HR officer that she had communicated with about withdrawal of her pension also sits on the SACCO board.
16. The Complainant alleged that there was unauthorized disclosure of her pension details and this was done by those processing her pension application, being the HR officer and the pension trustees.
17. The Complainant however did not provide evidence of the unauthorized disclosure.
18. She requested for compensation for damages due to the unauthorized disclosure of her personal information and penalties against the responsible party to deter future breaches and hold them accountable.

ii. THE RESPONDENT'S RESPONSE

19. The Respondent stated that they have noted the allegation against the HR officer and after thorough discussions with him and having reviewed their processes to determine where the gap is, they believe that the information was not released by him, Amref Health Africa or themselves to any third party, to the guarantor or to anyone as alleged by the Complainant.

F. INVESTIGATIONS UNDERTAKEN

20. 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 Complainant based on her complaint.

21. Through an email dated 30th April 2024, this Office requested a copy of the cease-and-desist letter that the Complainant sent to the Respondent and the response to the same.
22. The Complainant sent the letter, however, she did not send it to the Respondent.

G. ISSUES FOR DETERMINATION

23. 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; and
- ii. 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

24. The Complainant is a data subject within the definition of the Act has rights under Section 26 (c) of the Act to object to the processing of all or part of their personal data.
25. Further, Section 36 of the Act states that a data subject has a right to object to the processing of their personal data, unless the data controller or data processor demonstrates compelling legitimate interest for the processing which overrides the data subject's interests, or for the establishment, exercise or defence of a legal claim.
26. Regulation 8 of the Data Protection (General) Regulations, 2021 (the General Regulations) state that pursuant to Section 36 of the Act, a data subject may request a data controller or data processor to process all or part of their personal data, for a specified purpose or in a specified manner and the data

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controller or data processor shall, comply with a request for objection within fourteen days of the request.

27. In this complaint, the Complainant did not send the cease-and-desist letter to the Respondent in order to exercise her right of objection.

28. Further, she did not provide evidence to this Office that it was indeed the Respondent who shared her personal details with a third party. As a general rule, he who alleges must prove.

29. Therefore, this Office finds that the Complainant's rights were not violated by the Respondent as she did not provide any evidence that would suggest otherwise.

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

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

31. 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.*

32. There having been no evidence with regards to the violation of the Complainant's rights, the complaint is dismissed for lack of merit.

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H. FINAL DETERMINATION

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

- i. The complaint is dismissed for lack of merit.
- 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 July 2024.



IMMACULATE KASSAIT, MBS

DATA COMMISSIONER



