



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1090 OF 2024

DONALD MKALA NGOLO.....COMPLAINANT

-VERSUS-

PLATINUM CREDIT LIMITED.....RESPONDENT

DETERMINATION

(Pursuant to Sections 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 Complainant alleges that the Respondent processed and/or continues to process his personal data for marketing purposes without his express consent and/or any other lawful basis.

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 (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 19th July 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 1st August, 2024 referenced ODPC/CONF/1/5 VOL II (74). In the notification of the complaint, the Respondent was informed that if the Complainant's allegations were true, they would be in violation of various sections of the Act. Additionally, the Respondent was asked to provide this Office with the following:
 - i. A response to the allegations made against them by the Complainant;
 - ii. A contact person who would provide further details regarding the complaint
 - iii. Any relevant materials or evidence in support of their response;
 - iv. The contractual obligation between itself and the Complainant if any,



- v. Details of how it collected, stored and processed the Complainant's personal data and whether the Complainant gave express consent.
 - vi. Mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
 - vii. Any other information they wished the Office to consider.
8. The Respondent responded to the allegations made against it vide a letter dated 19th August, 2024 and received at the Office on 21st August 2024.

D. NATURE OF THE COMPLAINTS

9. The Complainant alleged that the Respondent processed and continues to process his personal data in violation of data protection laws by processing his personal data for marketing purposes without his express consent and/or any other lawful basis.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

10. The Complainant claims that the Respondent, either directly or through its agents repeatedly called his phones with marketing and promotional messages.
11. The Respondent identified several persons whom he believes to be agents of the Respondent who have insistently called him in a bid to market their services regardless of the fact that he has severally stated that he was not interested in the Respondent's service and that the Respondent should delete his number.
12. The Complainant further avers that he has taken several steps in an attempt to stop the Respondent from contacting him including filling and submitting the Respondent's request for erasure of personal data form on 21st May 2024, where the Respondent even went ahead and acknowledged receipt of the same.
13. The Complainant further wrote to the Respondent and requested it to cease and desist from contacting him without his express consent but the marketing phone calls still persisted, and thus gave rise to the Complaint with the Office.

14. As part of his evidence, the Complainant furnished the Office with --

- i. Screenshots of call logs from several agents who contacted him with time stamps.
- ii. The Request for Erasure form filled, executed and submitted to the Respondent.
- iii. Correspondence between the Complainant and the Respondent.

ii. THE RESPONDENT'S RESPONSE

15. The Respondent, *via* a letter dated 19th August 2024 and received at the Office on 21st August 2024, averred that upon notification of the complaint made against it by the Complainant, it initiated internal investigations, which it alleges that according to the results of its internal investigations, the Complainant is not and has never been its customer and as such it cannot trace the Complainant's information in its database.

16. The Respondent further states that it engages independent sales agents to market its products to potential customers. Furthermore, that the Respondent mandates these contracted independent agents to obtain explicit consent before marketing its products to individuals.

17. The Respondent states that two of telephone numbers used to call the Complainant have been identified to belong to one of its independently contracted sales agents and disciplinary process was initiated against such agent including termination of the agreement between itself and the agent.

18. The Respondent pleaded that the second telephone number was not registered to any contracted sales agent and has never been registered to any contracted agents and that the matter was subsequently reported to the Central Police Station for further investigations.

F. INVESTIGATIONS UNDERTAKEN

19. After careful analysis of the adduced evidence on record and the law, the Office established that the Complainant continuously received marketing phone calls from different agents who identified themselves as agents of the Respondent.
20. The Complainant furnished the Office with further evidence of recent call logs as recent as 9th October 2024 demonstrating that he is still receiving marketing calls and messages on the Respondent's services and products.
21. The Complainant submitted a request for erasure and deletion to the Respondent and an acknowledgement was received by the Respondent on the same date 21st May 2024. Subsequently on 22nd May 2024 the Respondent stated that it shall investigate the issue further for resolution.
22. The Respondent did not furnish the Complainant with further information or communication regarding the request for erasure and deletion.

G. ISSUES FOR DETERMINATION

23. 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:
 - i. Whether the Respondent fulfilled its obligations under the Act;
 - 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.

I. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

24. In considering this issue, the Office will examine the following questions –
 - a. Was there a valid data controller and data processor contract?
 - b. Did the Complainant consent to the use of his personal data for direct marketing purposes?

Was there a valid data controller and data processor contract?

25. The Respondent states that it engages independent sales agents to market its products to potential customers. Furthermore, that the Respondent mandates these contracted independent agents to obtain explicit consent before marketing its products to individuals.
26. The Respondent states that two of telephone numbers used to call the Complainant have been identified to belong to one of its independently contracted sales agents and disciplinary process was initiated against such agent including termination of the agreement between itself and the agent.
27. Section 2 of the Act defines a data controller as a person or entity who, either alone or jointly with others, determines the purpose and means of processing personal data. A data processor is defined as a person or entity that processes personal data on behalf of the data controller.
28. Section 25 of the Act imposes specific obligations on the data controller, including ensuring that personal data is processed lawfully, fairly, and transparently. The data controller must also ensure that personal data is collected for specified, explicit, and legitimate purposes, and is not further processed in a manner incompatible with those purposes.
29. Section 42 of the Act requires that where a data controller contracts a data processor to process data on its behalf, there must be a written contract in place that governs the relationship. The contract should outline the data processor's obligations, including the scope and purpose of the processing, and ensure that the data processor complies with the data protection principles under the Act.
30. Importantly, Section 42 of the Act emphasizes that the data controller retains full responsibility for ensuring the lawful processing of data, even when a processor is involved. Section 42(2) of the Act provides; that where a data controller is using the services of a data processor the data controller shall opt for a data processor who

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provides sufficient guarantees in respect of organizational measures for the purpose of complying with Section 41 (1). This provision clarifies that contracting a data processor does not absolve the data controller of liability for any violations of the Act. The data controller is still accountable for ensuring that the data processor complies with the required standards.

31. Regulation 24 of data protection (general) regulations, 2021 provides, that subject to section 42(2)(b) of the Act, a data controller shall engage a data processor, through a written contract and the contract shall include the following particulars –

a) *processing details including –*

- i) the subject matter of the processing;*
- ii) the duration of the processing;*
- iii) the nature and purpose of the processing;*
- iv) the type of personal data being processed;*
- v) the categories of data subjects; and*
- vi) the obligations and rights of the data controller*

b) *instructions of the data controller;*

c) *duty on the data processors to obtain a commitment of confidentiality from any person or entity that the data processors allow to process the personal data;*

d) *security measures subjecting the data processor to appropriate technical and organizational measures in relation to keeping personal data secure;*

e) *provision stipulating that all personal data must be permanently deleted or returned on termination or lapse of the agreement, as decided by the data controller; and*

f) *auditing and inspection provisions by the data controller.*

32. The Independent Sales Agent Agreement submitted to this Office by the Respondent is fundamentally deficient. It categorically fails to specify the essential elements required under the Data Protection Act, including but not limited to: the subject matter of the processing, the duration of the processing, the nature and purpose of the

processing, the type of personal data being processed, the categories of data subjects, and the obligations and rights of the data controller concerning the processing of personal data. These omissions represent a significant failure to comply with the statutory requirements, rendering the agreement non-compliant and legally inadequate.

33. Consequently, the Independent Sales Agent Agreement cannot, under any reasonable interpretation, be deemed a valid data processing contract between a data controller and a data processor. It falls markedly short of the legal threshold required for such agreements, as established under Regulation 24 of the Data Protection (General) Regulations, 2021. The failure to meet these critical legal requirements renders the agreement incapable of being recognized as a lawful processing contract, thus precluding it from conferring any of the rights or obligations typical of a compliant data controller-processor relationship.

34. It is on this foregoing that the Office finds the Independent Sales Agent Agreement the Respondent is relying upon as a data processing contract between itself and its independent agent therefore to be in violation of the requirements under Regulation 24 of the Data Protection (General) regulations, 2021 in *toto*.

Did the Complainant consent to the use of his personal data for marketing purposes?

35. The Respondent in support of its statement of response to the Office submitted its customer database that showed that the Complainant was not captured as its customer in its system database. The Complainant has averred that he is neither a client nor a customer of the Respondent and the complaint was solely based on unsolicited marketing.

36. Having found that the independent sales agents were acting on behalf of the Respondent, the Respondent had an obligation to establish a lawful basis for the processing of the Complainant's personal data for commercial purposes.

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37. Section 37(1) of the Act states that, *"a person shall not use, for commercial purposes, personal data obtained pursuant to the provisions of this Act unless the person –*

- a) Has sought and obtained express consent from a data subject; or*
- b) 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."*

38. Regulation 14(1) of the General Regulations provides the interpretation of 'commercial purposes' and provides that 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.*

39. By constantly calling the Complainant's phone number to market their products to him, the Respondent through its agents were processing the Complainant's personal data for commercial purposes as defined above.

40. Regulation 15 of the General Regulations sets out the permitted commercial use of personal data and states that, *"a data controller or data processor may use personal data, other than sensitive personal data, concerning a data subject for the purpose of direct marketing where—*

- a) the data controller or data processor has collected the personal data from the data subject;*
- b) a data subject is notified that direct marketing is one of the purposes for which personal data is collected;*
- c) the data subject has consented to the use or disclosure of the personal data for the purpose of direct marketing;*

d) the data controller or data processor provides a simplified opt out mechanism for the data subject to request not to receive direct marketing communications; or

e) the data subject has not made an opt out request.”

41. It was upon the Respondent to demonstrate that it had collected the personal data from the data subject, notified the data subject that direct marketing is one of the purposes for which the personal data is collected, obtained express consent from the Complainant before calling him to market their services and provided a simplified opt out mechanism. This burden was not discharged by the Respondent as it failed to prove that it obtained consent from the Complainant.

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

42. Section 26(a) of the Act provides for the right to be informed of the use to which a data subject's personal data is to be put. The Respondent, by not informing the Complainant of the use to which his personal data was to be put, at the point of collection of the personal data, violated his right to be informed. The Respondent's agents did not inform him that his personal data was being collected and the use to which it was to be put.

43. In addition, the Complainant submitted evidence of having exercised his right to deletion enshrined in Section 26 (e) of the Act as read with Section 40(1)(b) of the Act by submitting the Respondent's request for erasure of personal data form on 21st May 2024, where the Respondent acknowledged receipt of the same.

44. In its response, the Respondent did not address the process for erasure and deletion and/or any actions undertaken to stop the unlawful processing of the Complainant's personal data.

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45. The Respondent failed to act on it as evidenced by the Complainant providing proof that even after service of notification by this Office, the Respondent's agents continued contacting him including on 9th October, 2024.
46. From the above, this Office finds that the Complainant's rights under Sections 26(a) & (e) of the Act were violated by the Respondent.

III. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDIES UNDER THE ACT

47. 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.
48. As a remedy, the Complainant sought the Respondent to cease and desist from contacting him, delete his personal data from the Respondent's systems, databases and any other record and monetary compensation for the violation of his right as a data subject.
49. Section 65(1) of the Act provides, that a person who suffers damage by reason of a contravention of a requirement of this Act is entitled to compensation for that damage from the data controller or the data processor. Section 65(2) provides, a data controller involved in processing of personal data is liable for any damage caused by the processing.
50. Section 65(4) of the Act provides that "damage" includes financial loss and damage not involving financial loss, including distress.
51. Having found that the Respondent failed to uphold the rights of the Complainant as a data subject as envisaged under Section 26 (a) & (e), and the Respondent as a data controller processed the Complainant's personal data for commercial purposes without consent, it then follows that the Complainant is entitled to compensation. The Respondent is hereby directed to compensate the Complainant **KES 1,000,000 (One Million Kenya Shillings)**.

52. In so doing, this Office takes into account the nature and extent of violation with regard to unlawful processing of the Complainant's personal data and the conduct of the Respondent.

53. Furthermore, Section 58 of the Act as read together with Regulations 14 and 16 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 further contemplates, as a remedy, the issuance of enforcement notices against an entity that has failed or is failing to comply with any provisions of the Act and the attendant regulations thereto.

54. Having found that the Respondent did not fulfill its obligations provided for under the Act, the Office hereby orders for an enforcement notice to be issued against the Respondent.

H. FINAL DETERMINATION

55. In consideration of all the facts of the complaints, the evidence tendered and the investigations conducted, the Data Commissioner makes the following determination:

- i. The Respondent is hereby found liable.
- ii. The Respondent is ordered to compensate the Complainant **KES 1,000,000**.
- iii. An Enforcement Notice is hereby issued to the Respondent herein.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 16th day of October 2024



Immaculate Kassait, MBS
DATA COMMISSIONER