



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0608 OF 2024

VICTOR MANGA MUNYUACOMPLAINANT

-VERSUS-

LIQUID INTELLIGENT TECHNOLOGIES.....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 complaint concerns the allegation that the Respondent has been using the Complainant’s image on their website for commercial gain without express 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 (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 25th April 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 17th May, 2024 referenced ODPC/CONF/1/5 VOL 1 (968). In the notification of the complaint, the Respondent was informed that if the allegations by the Complainant were true, they were in violation of various sections of the Act. Further, among other things, the Respondent was asked to provide this Office with the following:
 - 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 process the Complainant's personal data;
 - d) Evidence as to whether the Complainant consented to the processing of their personal data for promotional purposes; and
 - e) A detailed description of whether it fulfills the duty to notify under Section 29 of the Act and how the same is fulfilled.

8. The Respondent responded to the allegations made against it *vide* a letter dated 27th May, 2024.

D. NATURE OF THE COMPLAINT

9. The Complainant alleged that the Respondent, without proper and/or justifiable cause, processed his image without his consent for marketing and commercial purposes on their website.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

10. The Complainant stated that he is business man who has held C-Level Executive roles at leading global companies and due to this the Respondent has been using his image commercial gain on its website.
11. The Complainant further alleged that the Respondent used and continued to use his image with the sole purpose to solicit clients for commercial gain.
12. The Complainant alleges that as a result of the use of his image, the misrepresentation of facts has allegedly occasioned him reputational damage as people associate him with the Respondent which he has inferred to be detrimental to his career.
13. The Complainant further stated that upon discovery of the violation, through his advocates he wrote a demand letter to the Respondent who through a letter dated 3rd April 2024 stated that the image in issue has been pulled down from its website, however no liability was to be admitted nor compensation for the same granted.
14. The Complainant further alleged that the violation in question pertains to the unauthorized processing of his image for commercial gain without his express consent. Thus, the Respondent's response being dissatisfactory, a complaint was subsequently filed with the Office.
15. As evidence, the Complainant adduced the following: -

- i. Screenshot photographs of the Respondent's website containing the Complainant's image;

ii. THE RESPONDENT'S RESPONSE

16. The Respondent maintained that it used the Complainant's image with his express consent.
17. The Respondent further stated that the Complainant personally consented to be photographed to have his image on the Respondent's website. The Respondent stated the Complainant, among others, was issued with a model release form on 24th April 2018. All participants including the Complainant were mandated to sign on the model release form as consent for the use of their images.
18. The Respondent further stated that the Complainant and other participants only signed the documents and the model release form did not however capture their names alongside the signatures. However, the Respondent insisted that the mere execution of the document suffices as proper express consent.
19. The Respondent further contended that at the point of receipt of the demand letter, the Complainant's image was immediately pulled down. The Respondent further stated that even though it pulled down the image, the same was not an admission of liability on its end since at the point of collection, processing and use, there was an express agreement between itself and the Complainant.
20. Upon being notified of the complaint by the Office, *vide* a letter dated 27th May 2024, the Respondent opted to resolve the complaint via Alternative Dispute Resolution facilitated by the Office, however *vide* letter dated 21st June 2024, the Respondent informed the Office that the alternative Dispute Resolution was unsuccessful.
21. In a response to the Office *vide* letter dated 10th June 2024, the Respondent firmly stated that it acquired express consent from the Complainant. The Respondent further stated that the Complainant has not demonstrated

commercial benefit gained from the use of his image and further allegations of damage suffered have not been substantiated, thus the Complainant's prayer for compensation is unfounded.

22. The Respondent pleaded that the Complainant's active and voluntary participation in the photo session whose purposes were disclosed and understood by all the participants, and the executed model release forms unequivocally gave express consent.

23. As evidence, the Respondent adduced the following: -

- i. Signed Model release forms dated 24th April 2018 - Consent forms
- ii. Copies of all images taken on and/or during that period

F. INVESTIGATIONS UNDERTAKEN

24. In exercising its investigative mandate as provided for in the Act, this Office conducted internal investigations on all documentation submitted.

25. During investigations, it emerged that the model release forms dated 24th April 2018 demonstrated the purpose of the photoshoot and indeed had several people sign on the document to express consent for the use of their images.

26. However, the Office could not ascertain whose signature belonged to which participant in the photoshoot as there were no names against the signatures. As such, the Respondent was requested to substantiate that the Complainant had consented to the use of his image by specifically identifying the Complainant's signature.

27. The Respondent was not able to specifically identify or demonstrate which of the signatures on the model release forms belonged to the Complainant. The Respondent stated that too much time had passed and so the same would have been impossible to substantiate.

G. ISSUES FOR DETERMINATION

28. It is undisputed that the Respondent used the Complainant's image on its website.
29. 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 obtained the Complainant's consent as required by the Act to use his image for commercial purposes;
 - 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 and the attendant Regulations.

I. WHETHER THE RESPONDENT OBTAINED THE COMPLAINANT'S CONSENT AS REQUIRED BY THE ACT TO USE HIS IMAGE FOR COMMERCIAL PURPOSES

30. Section 2 of the Act defines consent as any manifestation of express, unequivocal, free, specific, and informed indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data.
31. The definition of the Act details the minimum criteria of or for consent to be that it must be certain that the individual has consented, and what they have consented to. There must be a clear signal that they agree or have agreed to the processing. The unambiguity of the consent further links in with the requirement that consent must be verifiable to the extent that one must be able to demonstrate that the data subject consented to the processing.
32. From a combined reading of the above definitions, it is apparent that valid consent is a product of conscious decision-making and requires affirmative action. It should be demonstrable and capable of being proven.
33. Section 30 (1) (a) of the Act provides that a data controller or data processor shall not process personal data unless the data subject consents to the processing for one or more specified purposes.

34. The Act goes further to state the conditions of consent. It states as follows concerning the conditions of consent:-

32. Conditions of consent

(1) 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.

(2) Unless otherwise provided under this Act, a data subject shall have the right to withdraw consent at any time.

(3) the withdrawal of consent under sub-section(2) shall not affect the lawfulness of processing based on prior consent before its withdrawal.

(4) In determining whether consent was freely given, account shall be taken of whether, among others, the performance of a contract, including the provision of a service, is conditional on the consent of the processing of personal data that is not necessary for the performance of that contract. (emphasis ours)

35. Section 37 (1) of the Act provides for commercial use of data and states, "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 the data subject or 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."

36. Regulation 14 (1) of the Data Protection (General) Regulations 2021 further elaborates Section 37 of the Act 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.

37. It is undisputed that the Respondent used the Complainant's image in its website to advertise and market its services. As such, the Complainant's image was being

used to advance the Respondent's commercial and economic interests. By the general public visiting the Respondent's website one is induced whether directly or indirectly to buy, join and or subscribe to the Respondent's services. This constituted the use of the Complainant's image for commercial purposes which required express consent.

38. It was the Respondent's position that the Complainant's execution of the model release form dated 24th April 2018 and voluntary participation in the photo session whose purposes were disclosed and understood by all the participants unequivocally granted the Respondent express consent. However, the model release forms presented to this Office by the Respondent could not be relied upon to demonstrate consent as none of the signatures appearing on the forms could be attributed to the Complainant.
39. This Office further notes that the alleged violation took place before the enactment of the Act. That said, there were no guidelines in place giving a proper definition of what a consent form ought to have entailed and/or what amounts to express and unambiguous express consent.
40. However, the Respondent continuously used the Complainant's image, years after enactment of the Act. Upon the enactment of the Act, it was incumbent upon the Respondent to ensure the processing of personal data on the basis of consent complied with the Act as far as the requirements for valid consent are concerned.
41. Further, consent can only be proven by the Respondent as the burden of proof establishing a data subject's consent to the processing of their personal data for a specified purpose rests upon the data controller.
42. The Respondent herein did not furnish the Office with evidence demonstrating and/or showing that indeed the Complainant expressly consented to the use of his image and for commercial purposes.
43. From the above, it therefore follows that the Respondent has not discharged its burden of proof to demonstrate that the Complainant expressly consented to the use of his image for commercial purposes, as envisaged under Section 32 (1) and 37 of the Act.

44. This Office therefore finds that as far as issue no (i) is concerned, the Respondent did not obtain the requisite consent required by the Act to use the Complainant's image for commercial purposes.

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

45. Section 40 of the Act also provides for the right of rectification and erasure and states that a data subject may request a data controller or 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.

46. Further to the above, Regulation 12 (3) of the General Regulations provides that a data controller or data processor shall respond to a request for erasure within fourteen days of the request.

47. In his demand letter dated 25th March, 2024, the Complainant requested the Respondent to cease using his image on its website and to immediately pull it down.

48. Upon exercising his rights to erasure and rectification, as confirmed by both parties, the Complainant's image was deleted and pulled down from its website. This was communicated by the Respondent in its letter dated 3rd April, 2024.

49. This Office therefore finds and determines that as far as issue no (ii) is concerned, the Respondent did not violate the Complainant's rights as envisaged under the Act.

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

50. According 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.



51. Having considered the merits of the complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent processed the Complainant's image for commercial purposes without the requisite consent as stipulated under the Act, it therefore, follows that there has been a violation of the Act by the Respondent to that extent.
52. It is also evident that even after the enactment of the Act, the Respondent continued to process the Complainant's personal data as against Sections 30 (1) (a) and 32 (1) and 37 of the Act and for commercial purposes.
53. Upon enactment of the Act, the Respondent failed to demonstrate and/or substantiate that the processing undertaken while it was in continuous use of the Complainant's image was in line with the act.
54. 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.
55. 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.
56. The Complainant sought various remedies including that the Respondent takes down the post from its website, a penalty/fine and compensation.
57. The Respondent contended that the award of compensation ought not to be awarded as the offending image was pulled down from its website. The Respondent further contended that in as much as the Complainant's image was being used by it on its website on and/or during that period they acted on the basis that they had sought for consent by making the Complainant and other participants sign on the model release form.
58. Having found that the Respondent is not able to prove that it obtained express consent from the Complainant, and the Respondent's continued use of the

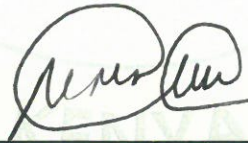
Complainant's image on its website even after the enactment of the Act, the Respondent is hereby directed to compensate the Complainant the amount of **Kshs. 500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only)** for the continual use of the Complainant's image for commercial purposes without express consent.

I. FINAL DETERMINATION

59. In the ultimate, the Data Commissioner makes the following final determination;

- i. The Respondent is hereby found liable for the use of the Complainant's image for commercial purposes without express consent;
- ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Five Hundred Thousand (Kshs. 500,000)** as compensation; and
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 24th day of July 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

