



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1398 OF 2024

DANIEL ODHIAMBO OPIYO.....1ST COMPLAINANT

JEREMIAH BARASA2ND COMPLAINANT

-VERSUS-

TULIA AMBOSELI SAFARI CAMP LTD.....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 Complainants' claim that the Respondent used their image commercially to market and advertise their hospitality services platforms without their authority and approval.

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

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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 OF THE COMPLAINT

5. The Office received a complaint by Daniel Odhiambo Opiyo and Jeremiah Barasa Mukawale (hereinafter 'Complainants'), on 14th September 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 Complainants who are the aggrieved data subjects.
6. Pursuant to Regulation 11 of the Enforcement Regulations, *via* letter dated 7th October 2024 and referenced ODPC/CONF/1/5/VOL II (229), this Office notified the Respondent of the complaint filed against it and required their response within 21 days.
7. On 11th October 2024, the Respondent responded to the said notification. In the response, among other things, the Respondent requested that the complaint be resolved through mediation according to Section 9 (1) (c) of the Act, Regulation 15 of the Enforcement Regulations, and the Alternative Dispute Resolution (ADR) Guidelines published by this Office.
8. As the ADR process is party-driven, the Complainants were requested to consent to resolving the dispute through mediation or conciliation. The Complainants agreed to attempt to resolve the dispute through ADR.
9. Despite attempts to resolve the dispute through ADR, the complaint was not resolved and therefore, the dispute was referred back to this Office for determination as per Regulation 15 (8) of the Enforcement Regulations which provides that where the complaint is not determined through ADR, the Data

Commissioner shall proceed to determine the complaint as provided for in the Act and the Regulations.

10. This determination is therefore a result of analysis of the complaint as received, the responses from the Respondent, and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

I. COMPLAINANT'S CASE

11. It is the Complainants' case that the Respondent took their images without their authority and approval and published them on its website passing the images off as an advertisement for bush breakfast.

12. The Complainants contended that the images presented an untrue fact that depicted the Complainants as working for Tulia Amboseli Safari Camp Ltd to deliver bush breakfast yet they never worked for the entity.

13. The Complainants further contended that at the time the images were taken, they were working for Airborne African Antiques Ltd which was a different entity from Tulia Amboseli Safari Camp Ltd and in the hot air balloon industry.

14. As part of their evidence, the Complainants adduced

- i) The Complainant's Demand letter addressed to the Respondent.
- ii) The Respondent's website pages containing the Complainants' images.

II. RESPONDENT'S CASE

15. As stated above the Respondent provided a response to the complaint on 11th October 2024.

16. In its response, the Respondent stated that:

- i. The Complainants have admitted that they were employees of Airborne African Antics Limited (AAAL) and that the impugned photograph was taken by their employer and had been uploaded to AAAL's website.

- ii. Tulia Amboseli Safari Camp Ltd acquired AAAL in 2018 and at the time of the said acquisition, the image had been on the Company's website with the approval of the Complainants.
- iii. They have not used the said image for commercial purposes and neither have they generated any commercial benefit from the said image.
- iv. They received a demand letter dated 15th January 2024 and 28th March 2024 and duly responded to the demand letters by their letters dated 19th February 2024 and 9th May 2024. They also pulled down the image immediately as a demonstration of its good faith and commitment to an amicable resolution of the issue.
- v. They proposed to solve the matter through alternative dispute resolution.

E. ISSUES FOR DETERMINATION

17. Having considered the nature of the complaint, the evidence adduced by all parties to the complaint, and the investigations conducted by this Office in line with the mandate as stated in paragraphs 3 & 4 herein, the issues for determination that arise are:-

- i. Whether the Complainant's personal data was lawfully processed; and
- ii. Whether the Complainant is entitled to any remedy under the Act.

F. ANALYSIS AND DETERMINATION

I. WHETHER THE COMPLAINANTS' PERSONAL DATA WAS LAWFULLY PROCESSED.

18. The Complainants challenge the Respondent's use of their images for advertisement purposes without their authority and approval. The photographs are personal data as they identify the Complainants and were publicly available.

19. The Respondent does not dispute that the Complainants' photographs were on their website even after acquisition of the business from another entity (Airborne African Antics Limited (AAAL)).

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20. Upon acquiring AAAL, the Respondent became the data controller to the extent that they determined the purpose and means of processing the Complainants' personal data on their website.
21. Section 37 of the Data Protection Act provides for commercial use of data and states 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.
22. 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]*
23. By the Respondent showcasing that it was providing bush breakfast, it was advancing its commercial interests by inducing the members of the public to experience and enjoy its bush breakfast hospitality. It influenced commercial transactions both indirectly and directly.
24. As such, the actions of the Respondent amounted to commercial use of the Complainants' personal data, without their express consent or authority under any written law, as required by Section 37(1) of the Act.
25. As to the Respondent's contention that the impugned image had been on the Company's website with the approval of the Complainants, this Office notes that the Respondent has not discharged its burden of proof as envisaged under Section 32(1) of the Act.

26. Section 32 (1) of the Act provides 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.

27. The Office therefore finds that the Respondent unlawfully processed the Complainants' personal data for commercial purposes.

II. WHETHER THE COMPLAINANTS ARE ENTITLED TO ANY REMEDY UNDER THE ACT.

28. 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.

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

30. 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.

31. 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.

32. The Complainants claimed for the remedy of compensation against the Respondent.

33. Having found that Respondent processed the Complainants' personal data for commercial purposes without express consent, the Respondent is hereby directed to compensate the Complainants an amount of KES. **500,000/= (Five Hundred Thousand Shillings Only) Each.**

34. For the avoidance of doubt, the 1st Complainant is to be compensated KES. 500,000/= and the 2nd Complainant is also to be compensated with a similar amount of KES. 500,000/=

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for unlawfully processing the Complainants' personal data for commercial purposes without express consent.
- ii. The Respondent is ordered to Compensate the Complainants an all-inclusive total sum of KES **1,000,000/= (One Million Kenya Shillings Only)** for the unlawful processing of the Complainants' personal data for commercial purposes as follows:-
 - **1st Complainant KES. 500,000/=**
 - **2nd Complainant KES. 500,000/=**
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this^{13th}.....day of^{December}.....**2024**



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

