



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1131 OF 2024

JOAN KAKUVI MUNUVECOMPLAINANT

-VERSUS-

EVANSON WAHOME RUGARA T/A

HOUSE OF RAM.....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 used the Complainant’s image to market his travel and tour services on a social business mobile application “WhatsApp Business” 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 1st August, 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 him *vide* a letter dated 9th August, 2024 referenced ODPC/CONF/1/5 VOL II (93). In the notification of the complaint, the Respondent was among other things 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) Mitigation measures adopted or being adopted to address the dispute to the satisfaction of the Complainant
 - f) Mitigation measures adopted or being adopted to ensure such occurrence addressed in the complaint do not recur.
 - g) Any other information that he may wish the Office to consider.
8. The Respondent failed, refused or neglected to responded to the Notification of Complaint.
9. This determination is therefore pursuant to Regulation 11(2) of the Enforcement Regulation which provides that where a Respondent does not take any action as contemplated under sub-regulation the Data Commissioner shall proceed to determine the complaint in accordance with the Act and these Regulations

D. NATURE OF THE COMPLAINT

10. The Complainant alleged that the Respondent processed her image without her consent for marketing and commercial purposes.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i) THE COMPLAINANT'S CASE

11. On or about 1st June 2024 the Complainant and several others engaged the Respondent's services through his travel and tours company dubbed House of Ram to facilitate for a team building tour in Arusha, Tanzania.
12. Sometime early July 2024, the Complainant, along with another individual identified as Sxxxxxn Kxxxxe Mxxxxi, became aware through the Respondent's "WhatsApp Business" status that the Respondent had published an advertisement for holiday team excursions. This advertisement, which included details such as pricing, modes

of payment, and services offered, prominently featured the Complainant's image, dressed in a swimsuit. The advertisement was disseminated as a status update publicly accessible for a limited duration of 24 hours, and was visible to multiple parties, including but not limited to Mr. Mxxxxi.

13. The Complainant initiated communication with the Respondent through "WhatsApp" messages in an attempt to ascertain the reasons behind the Respondent's decision to use her image in the promotional catalogue for holiday excursions for commercial gain without her consent. However, in her submission to this Office, the Complainant asserts that these efforts to resolve the matter were unproductive and yielded no satisfactory explanation or resolution.

14. *Vide* a demand letter dated 18th July 2024; the Complainant wrote to the Respondent requesting him to take down all her pictures, admit liability in writing and compensate her to the tune of Ksh.50,000 for using her image without consent and for marketing and commercial purposes. The Respondent failed, refused or neglected to respond to the same, thus, the Complainant proceeded to file a complaint with the Office.

15. As evidence, the Complainant adduced the following: -

- i. The business catalogue posted by the Respondent in his WhatsApp Business page with her image in a swim suit from her excursion.
- ii. Her conversation with the Respondent enquiring about her rights as a data subject and the Respondent's obligations under the Act.
- iii. A recent photograph of herself.
- iv. Written witness statement from a third party who had public access to the Respondent's business catalogue with the Complainant's image on the Respondent's *WhatsApp* status
- v. A copy of the demand letter to the Respondent.

ii) THE RESPONDENT'S CASE

16. The Respondent was non-responsive and did not respond to the Notification of Complaint filed against it. Therefore, the allegations levelled against him remain uncontroverted.

F. ISSUES FOR DETERMINATION

17. In light of the above, 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 her 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 HER IMAGE FOR COMMERCIAL PURPOSES

18. 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.

19. 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.

Handwritten signature or initials.

(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)

20. 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."

21. 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.

22. It is undisputed that the Respondent used the Complainant's image on a public business account to advertise and market its services, consequently, the Complainant's image was used to further the Respondent's commercial and economic interests. The use of the Complainant's image, visible to the general

public viewing the WhatsApp Status, was intended to induce potential clients, whether directly or indirectly, to use the Respondent's services. This use of the Complainant's image for commercial purposes required explicit consent.

23. It is trite that where consent has been obtained orally, the same must be reduced into writing or recorded electronically, with an obtainable script. That way, the consent can 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.

24. The Respondent failed, refused and/or neglected to provide any response or submit a statement to this Office addressing the allegations made against him, despite being afforded the opportunity to do so.

25. That being said, it therefore follows that the Respondent has not discharged his burden of proof to demonstrate that the Complainant expressly consented to the use of her image for commercial purposes, as envisaged under Section 32 (1) and 37 of the Act.

26. 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 RIGHT TO ERASURE UNDER THE ACT

27. Section 26(e) sets out the right to deletion. Section 40(1)(b) of the Act also provides for the right of 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.

28. Further to the above, Regulation 12 (3) of the General Regulations, 2021 provides that a data controller or data processor shall respond to a request for erasure within fourteen days of the request.
29. The Complainant alleges that she requested the Respondent to take down all her pictures on social media. The Complainant only provided evidence of her picture having been posted on the Respondent's Whatsapp Business Status. The date the same was posted is not indicated. The request for erasure was communicated to the Respondent *vide* a letter dated 18th July, 2024. The Office notes that in the nature of Whatsapp status, the image was publicly accessible for a limited duration of 24 hours.
30. The Office could not therefore establish whether the image was still posted on the Respondent's Whatsapp Business Status or not when the request for erasure was made.
31. Based on the foregoing, this Office hereby finds and determines that, with respect to issue no. (ii), the Respondent did not violate the Complainant's right to erasure under the Act.

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

32. 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.
33. Having considered the merits of the complaint, the evidence adduced, 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.

34. The Complainant sought various remedies, including that the Respondent; pull down any and all posters that contain her image and/or likeness, cease and desist from using the complainant's image and likeness, monetary compensation, and a public apology from the Respondent.

35. 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. 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.

36. Having found that the Respondent did not obtain the requisite consent from the Complainant for the use of her image for commercial purposes without express consent, the Respondent is hereby directed to compensate the Complainant the amount of **KES 500,000 (Kenya Shillings Five Hundred Thousand Shillings)**.

G. FINAL DETERMINATION

37. the Data Commissioner makes the following determination:

- i. The Respondent is hereby found liable.
- ii. The Respondent is ordered to compensate the Complainant **KES 500,000 (Kenya Shillings Five Hundred 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 23rd day of October 2024



Immaculate Kassait, MBS
DATA COMMISSIONER

