



**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 1475 OF 2024**

SHERLEEN WAWIRA KIURA.....COMPLAINANT

-VERSUS-

WANANCHI GROUP (K) 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. The Office received a complaint on 24th September, 2024 alleging that the Respondent and its product 'Zuku' had been sending the Complainant promotional messages to market their product despite the termination of the agreement and her further objection to receiving promotional messages.

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 against the Respondent company on 24th September, 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by the Complainant who was the aggrieved data subject.
7. The Respondent company provides entertainment and internet service through its 'Zuku' brand. The brand offers digital services on two platforms, 'Zuku Fiber' and 'Zuku Satellite TV'.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 15th October, 2024 referenced **ODPC/CONF/1/5 VOL II (255)**. 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 and the attendant Regulations. Further, the Respondent was asked to provide this Office with the following:
 - a) A response to the allegations made against them by the Complainant and, a contact person who can provide further details as regards the complaint;
 - b) Any relevant materials or evidence in support of the response above;
 - c) The contractual agreement with the Complainant;

- d) Whether the Complainant was notified and gave express consent for the use of her personal data for commercial purposes pursuant to Section 37 Act;
 - e) The lawful basis for denying the Complainant her right to object to the processing of her personal data for commercial purposes;
 - f) 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.
9. The Respondent responded to the notification of complaint letter *via* a letter dated 30th October, 2024 and 22nd November, 2024.

D. NATURE OF THE COMPLAINT

10. The complaint is in respect of the processing of the Complainant's personal data through sending of promotional messages despite objection to receiving promotional messages.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

11. The Complainant stated that she was using Zuku services sometime in 2022-early 2023 when she changed her internet service provider
12. The Complainant alleged that since terminating her engagement with them, Zuku have been endlessly sending her promotional messages on a daily basis despite sending them an email through their "Contact Us form" available on their website. They acknowledged receipt of the form on 26th August 2024 and they still continue to send her messages daily.
13. According to the Complainant, she also sent them an email instructing them to delete her contact details from their system as she shall not be using their services anymore. She further state that their phone numbers never go through despite trying to call them severally.

14. The Complainant further stated that despite exercising her rights, the Respondent still continues to infringe on her rights by constantly sending her promotional messages. This, she asserts, is in violation of her privacy rights under the Data Protection Act and the General Regulations.

15. According to the Complainant, since the email was sent on 26th August 2024, they still continued to send her daily promotional messages.

16. In addition to the complaint, the complainant sought the following redress:

a. Compensation for the infringement of her right to be informed that they will collect her personal data for promotional purposes, the right to object to further processing of her personal data and the right to deletion of her personal details from their system.

b. Compensation for the use of her personal details for commercial purposes and for subjecting her to automated decision-making.

17. The Complainant attached the following documents to support her complaint:

- Screenshots of the multiple text messages that she received from the Respondent.
- An email on termination of service dated 29th February 2024.
- A further email requesting the erasure of her personal details from the Respondent's system and objecting to the promotional messages.

ii. THE RESPONDENT'S RESPONSE

18. The Respondent stated that the Complainant was onboarded as a customer of Zuku services on 17th November 2022. During the period of service, she enjoyed uninterrupted access, and when complaints regarding slow internet speeds arose, the matter was promptly rectified to ensure she continued receiving quality service.

19. The Respondent posited that on 29th February 2024, they received an email from the Complainant requesting the termination of her service. In accordance with their customer retention efforts, they state that they made several

attempts to contact her to resolve any outstanding issues and retain her as a customer. Unfortunately, their calls went unanswered. They wrote to her requesting that she provides them with a reachable contact number to facilitate further communication. However, they did not receive any response from the Complainant until the present complaint was lodged with this Office.

20. According to the Respondent, upon onboarding customers, including the Complainant, the customers are required to complete and sign a subscription form. This form serves as the contractual agreement between Zuku and the customer.
21. They state that the signing of this form is deemed to be express consent by the data subject for their personal data to be processed and to allow them to offer the necessary services otherwise they are unable to deliver such services.
22. The Respondent alleged that with regard to the request for the erasure of the Complainant's personal data, they wish to clarify that this was not in any way a refusal. They had every intention to comply. According to them, the Complainant had been provided with company-owned equipment which she was required to return upon termination and failed to do so. They thus held on to the request as this was necessary to establish a legal claim in the event they lodged a claim against the customer for failure to return the equipment which they were considering.
23. The Respondent claimed that upon receiving this complaint, they again reached out to the Complainant who was now available, and she agreed that they proceed to recover the equipment on 19th October 2024. The equipment was successfully collected on that date, after which her account was deleted and they can thus confirm that all her personal data was promptly erased.
24. The Respondent attached the following in support of their response.
 - i. The Subscription Agreement between themselves and the Complainant.
 - ii. Images of email communication between themselves and the Complainant.

F. INVESTIGATIONS UNDERTAKEN

25. The investigation process entailed a review of available documentation including the complaint form as lodged by the Complainant and the supporting evidence and the Respondent's Response and the supporting evidence.
26. Upon analyzing the evidence, the Office established that the Respondent tried to contact the Complainant severally and she was unreachable on phone. Her continued possession of the equipment signified a continuing contractual relationship.
27. Clause 10.3 of the Respondent's Terms and Conditions states that;
The Customer shall cooperate and allow Wananchi or Wananchi's authorised representatives to uninstall and recover its Customer Premise Equipment and any other Wananchi Equipment at the Customer premises without delay. For avoidance of doubt, should the Customer fail to cooperate and grant access for such recovery Wananchi shall be at liberty to keep Customer data for purposes of establishing, exercising and defending a legal claim against the Customer.
28. From the above, it is noted that when the Complainant failed to cooperate and grant access for the recovery of the Respondent's equipment, the Respondent had a lawful basis for continuing to hold the Complainant's personal data, which was, to establish a legal claim.
29. The Office further reviewed the promotional messages sent by the Respondent to the Complainant and established that the same constituted direct marketing as defined in Regulation 14 (2) of the Data Protection (General) Regulations, 2021.

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G. ISSUES FOR DETERMINATION

30. In light of the above, the following issues fall for determination by this Office:

- i. Whether there was a violation of 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 A VIOLATION OF COMPLAINANT'S RIGHTS UNDER THE ACT

31. Section 26(c) of the Act provides for the right to object to the processing of personal data. The Complainant exercised this right *via* email on 26th August 2024 and informed the Respondent that she did not want to receive daily promotional messages from Zuku.

32. Despite exercising her right to object to the processing of her personal data for purposes of direct marketing, the Respondent continued contacting her.

33. The Respondent in its response stated that the Subscription Agreement specifically outline that the company collects data to be able to offer services and details the purpose of processing the collected personal data, which includes marketing and promotional activities.

34. Regulation 8 (4) of the Data Protection (General) Regulations 2021, provides that;

*"The right to object to processing applies as **an absolute right** where the processing is for direct marketing purposes which includes profiling to the extent that it is related to such direct marketing."*

35. The Respondent ought to have complied with the Complainant's objection request within fourteen days of the request as provided for under Regulation 8(3) of the Data Protection (General) Regulations, 2021 and stopped processing her personal data. The Respondent intentionally and/or negligently ignored the Complainant's objection and continued contacting her even after the 14-day period provided under the above Regulation had lapsed.

36. On the right to be informed, this Office finds that the Complainant was duly informed that her personal data would be used for commercial purposes at Clause 8.2.3 of the Subscription Agreement.

37. As regards the Complainant's claim on the right not to be subjected to automated decision making, this Office finds that the Complainant did not provide evidence to demonstrate that she had been subjected to a decision based solely on automated processing, including profiling, which produces legal effects concerning or significantly affects her, as the data subject.

38. On the right to erasure of her personal data, the Office finds that in accordance with Clause 10.3 of the Respondent's Subscription Agreement, upon termination of the Agreement, the Respondent could retain customer data for purposes of establishing, exercising and defending a legal claim against the Customer, until they recovered their Customer Premise Equipment. The Respondent confirmed that the equipment was successfully collected from the Complainant, after which her account was deleted and they confirmed that all her personal data was promptly erased.

39. In conclusion, this Office therefore finds that the Respondent violated the Complainant's rights to object to the processing of her personal data for purposes of direct marketing.

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

40. 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. The Complainant requested for several orders from this Office as set out hereinbefore.

41. Having found the Respondent liable for violation of the Complainant's right to object under the Act, she is entitled to compensation under Section 65 of the Act, which 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.

42. Section 65 (4) of the Act states that "damage" includes financial loss and damage not involving financial loss, including distress.

43. Further, Regulation 14 (3) (e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.


44. In view of the foregoing, the Respondent is hereby ordered to compensate the Complainant **Kshs. 250,000 (Two Hundred and Fifty Thousand Kenya Shillings Only)** for violating her right to object to processing of her personal data for direct marketing purposes.

H. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for violation of the Complainant's right to object to the processing of her personal data for direct marketing purposes.
- ii. The Respondent is hereby ordered to compensate the Complainant **Kshs. 250,000 (Two Hundred and Fifty Thousand Kenya Shillings)**.
- iii. 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 December 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

