



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1436 OF 2024

CAROLINE WANJIRU KAN'GETHECOMPLAINANT

-VERSUS-

**CIRCUS 254 C/O
SARAKASI TRUST.....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 on its social media platforms for commercial purposes without her express consent 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 September, 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 14th October, 2024 referenced ODPC/CONF/1/5 VOL II (254). 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 it by the Complainant and, a contact person who could provide further details as regards the complaint;
 - b) Provide any relevant materials or evidence in support of its response;
 - c) Evidence as to whether the Complainant was notified pursuant to Section 29 Act;

- d) A contractual agreement between itself and the complainant, if any;
 - e) Details of how it collected, stored, and processed the complainant's personal data, and whether she consented to the processing of her personal data;
 - f) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
 - g) Any other information you wish the Office to consider.
8. The Respondent responded to the allegations made against it *vide* a letter dated 5th November, 2024.

D. NATURE OF THE COMPLAINT

9. The Complainant alleged that the Respondent, without proper and/or justifiable cause, processed her image on Instagram and Facebook for marketing and commercial purposes.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

10. The Complainant asserts that she attended an event hosted by the Respondent. On 23rd April 2024 and 3rd May 2024, she discovered that the Respondent had posted a photo of her taken at the event on its Instagram and Facebook social platforms, which are used for advertising, marketing, and promotional purposes, without her prior knowledge, consent, or authorization.
11. The Complainant states that the Respondent was served with a demand letter requesting the immediate removal of the photos, an admission of liability, and compensation. However, the Complainant asserts that while the Respondent removed the photos, they disregarded the other demands, prompting the filing of this complaint.
12. As evidence, the Complainant furnished the Office with
- i. Screenshots of the Complainant's images on the Respondent's Facebook and Instagram platforms.

- ii. A demand letter addressed to the Respondent.

ii. THE RESPONDENT'S RESPONSE

- 13. The Respondent asserted that it took all reasonable precautions to notify attendees that photography would occur in specific areas of the event and that any photos taken during the event might be used by the Respondent without incurring liability, legal claims, or obligations for compensation.
- 14. The Respondent averred that Circus 254 is not an independent organization but a curated experience operated under the brand of Sarakasi Trust. That the event in question took place on 20th April 2024 and was accessible only to paying patrons who were issued physical or e-tickets.
- 15. The Respondent stated that it operates Instagram and Facebook pages to advertise the experience beforehand and to share content, including photographs, after the event.
- 16. The Respondent further asserted that patrons were clearly notified through prominent "Photo Zone" warnings that photography would occur in designated areas and that such images might be used for lawful purposes without incurring liability or compensation claims. The notice read in full as follows:

NOTICE YOU ARE ENTERING AN AREA WHERE PHOTOGRAPHY, AUDIO, AND VIDEO RECORDING MAY OCCUR. PLEASE BE AWARE THAT BY ENTERING THE EVENT PREMISES YOU CONSENT TO BE PHOTOGRAPHED, FILMED, AND/OR OTHERWISE RECORDED WITHOUT COMPENSATION AND WAIVE AND RELEASE ANY CLAIMS YOU MAY HAVE RELATED TO THE USE OF RECORDED MEDIA OF YOU AT THE EVENT FOR ANY PURPOSE WHATSOEVER IN PERPETUITY IN CONNECTION WITH THE ALCHEMIST, BY WAY OF EXAMPLE, USE ON WEBSITE, IN SOCIAL MEDIA, NEWS AND ADVERTISING OR FOR ANY PAYMENT FOR USE OF SUCH

*RECORDED MEDIA. DO NOT ENTER THIS AREA IF YOU DO NOT
AGREE TO THE FOREGOING.*

*TUNAOMBA MUELEWE KWAMBA KWA KUIINGIA ENEO HILI,
UNAKUBALI KUPIGWA PICHA, BILA KULIPWA, NA UNATOA
RUHUSA KWA PICHA YAKO KUTUMIKA KATIKA FILAMU,
MATANGAZO, KANDA NA KUTUMIKA KATIKA VYOMBO VYA
HABARI. WENYE ENEO HILI NA WADHAMINI WA SHIGULI HII
HAWATOWAJIBIKA NA JAMBO LA AINA YOYOTE AMBALO
LITATOKEA. TAFADHALI USIINGIE ENEO HILI KAMA HUKUBALIANI
NA YALE YATAKAOENDELEA HAPA*

17. Another of the "Photo Zone" Warnings read as follows:

*NOTICE OF PHOTOGRAPHY AND FILMING YOU ARE ENTERING AN
AREA WHERE PHOTOGRAPHY, AUDIO, AND VIDEO RECORDING
MAY OCCUR. PLEASE BE AWARE THAT BY ENTERING THE EVENT
PREMISE, YOU CONSENT TO SUCH RECORDING MEDIA AND ITS
RELEASE, PUBLICATION, EXHIBITION OR REPRODUCTION IF YOU
DO NOT AGREE TO THE FOREGOING, PLEASE DO NOT ENTER
THIS AREA.*

*TUNAOMBA MUELEWE KWAMBA KWA KUIINGIA ENEO HILI,
UNAKUBALI KUPIGWA PICHA, BILA KULIPWA, NA UKATOA
RUHUSA KWA PICHA YAKO KUTUMIKA KATIKA FILAMU,
MATANGAZO, PAMOJA NA KUTUMIKA KATIKA VYOMBO VYA
HABARI. WENYE ENEO HILI NA WADHAMINI WA SHUGHULI HII
HAWATOWAJIBIKA NA JAMBO LA AINA YOYOTE AMBALO
LITATOKEA. TAFADHALI USIINGIE ENEO HILI KAMA HUKUBALIANI
NA YALE YATAKAYOENDELEA HAPA.*

18. The Respondent asserted that the Complainant, by entering the premises where the event was held, implicitly agreed to the terms outlined by the prominently displayed warnings. The Respondent stated that the Complainant's presence in the designated "Photo Zones" demonstrated her conscious decision to attend the performance under these conditions.
19. The Respondent further averred that the photographs taken during the event primarily focused on the performance, with patrons appearing incidentally as part of the backdrop, and that such images were used solely for legitimate purposes, including artistic expression, cultural promotion, and lawful documentation, as permitted by applicable laws.
20. The Respondent averred that the photographs in question did not include any textual descriptions or personal data that would fall within the scope of Section 2 of the Data Protection Act. The Respondent further stated that the content of the images did not depict the Complainant in any manner that could be deemed private, undignified, offensive, or objectionable to a reasonable person. The Respondent asserted that the event took place in a public space where attendees could not have had a reasonable expectation of privacy, particularly given the explicit warnings that the premises were designated as photo zones.
21. The Respondent stated that upon receiving a formal complaint from the Complainant, it immediately removed the photographs in question as a sign of good faith. The Respondent further asserted that the Complainant could not reasonably have expected privacy for two key reasons:
- (i) the event was held in a public venue for a public purpose, and
 - (ii) the explicit "Photo Zone" warnings clearly communicated the likelihood of photography. The Respondent averred that by attending the event as a paying patron and entering these areas, the Complainant voluntarily assumed the inherent risks associated with publicity in such settings.

74

22. The Respondent respectfully submits that the complaint lacks merit, as all actions were conducted within the bounds of the law, with reasonable precautions taken to inform patrons, and with good faith and efforts made to address the Complainant's concerns.

23. As evidence in support of its statement, the Respondent adduced the following: -

- i. Definitive Trust Deed
- ii. Revised Trust Deed
- iii. Circus 254 event poster
- iv. Alchemist photography disclaimer
- v. Jaigermeister photography disclaimer

F. ISSUES FOR DETERMINATION

24. It is undisputed that the Respondent used the Complainant's image on its Instagram and Facebook social platforms.

25. As a preliminary issue, this Office states that whereas the Respondent stated that it is a not-for-profit Trust and talent development organization, it is a data controller as defined in the Act, being the entity that determined the purposes and means of processing the Complainant's personal data.

26. 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 law;
- ii. Whether there was a violation of the Complainant's right to erasure; and
- iii. Whether the Complainant is entitled to remedies under the Act.

I. WHETHER THE RESPONDENT OBTAINED THE COMPLAINANT'S CONSENT AS REQUIRED BY LAW

27. The Respondent stated that they had a contractual agreement with the Complainant by virtue of the fact that the performance attended by the Complainant was a paid event and attendance was pegged to payment for which physical and e-tickets were issued. According to them, the Complainant's purchase of e-tickets, attendance at the event, and presence in an area where photography notices were displayed constituted express consent to process and use her image.
28. 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 [Emphasis]. 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.
29. 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.
30. To ensure that the Respondent obtained specific and informed consent, they ought to have, at a minimum, provided the following –
- a. The data controller and data processor's identity: the data controller or data processor must identify itself and name any third party who will be relying on the consent.
 - b. The purpose of the processing: a consent request must specifically cover all purposes for which the consent is sought.

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- c. The processing activities: granular consent options for each separate type of processing should be provided unless those activities are clearly interdependent.
- d. The right to withdraw consent at any time: details of how a data subject may exercise their right to withdraw consent should be provided.

31. Further, the element 'free' implies real choice and control for the data subject. If they feel compelled or will endure negative consequences if they do not consent, then consent will not be valid.

32. Valid consent is thus a product of conscious decision-making and requires affirmative action. It should be demonstrable and capable of being proven. The Respondent did not provide evidence that they obtained express consent from the Complainant to process her personal data on social media.

33. The Act goes further to state the conditions of consent. It states as follows concerning the conditions of consent at Section 32: -

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)

34. 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.”

35. 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.

36. It is undisputed that the Respondent used the Complainant's image on its Instagram and Facebook social platforms 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.

37. The "Photo Zone" notices merely constitute notification that photography will occur and do not meet the threshold of valid consent under the Act. Disclaimers cannot substitute for consent, as they do not satisfy the requirements for informed, affirmative, and explicit agreement as envisaged under the Act. Therefore, the Respondent cannot rely on these disclaimers to demonstrate valid consent.

38. Additionally, while the Respondent claims the photography was undertaken for legitimate purposes such as artistic documentation and cultural promotion, the subsequent publication of the Complainant's image on social media without her consent breached the Act.

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39. 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. The Respondent herein did not furnish the Office with evidence demonstrating and/or showing that indeed the Complainant expressly consented to the use of her image on social media platforms.

40. 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.

41. This Office therefore finds that the Respondent did not obtain the requisite consent required by the Act to use the Complainant's image for commercial purposes.

II. WHETHER THE RESPONDENT VIOLATED THE COMPLAINANT'S RIGHT TO ERASURE

42. 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.

43. 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.

44. In her demand letter, the Complainant requested the Respondent to cease using her image on its Instagram and Facebook platforms and to immediately remove the image. Both parties acknowledge that this request was promptly and effectively complied with.

45. This Office therefore finds that the Respondent did not violate the Complainant's rights as envisaged under the Act.

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

46. 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.
47. 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.
48. 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.
49. The Respondent's claim of good faith by removing the images on its Instagram and Facebook social platforms upon receipt of the demand letter does not negate the breach. The violation occurred at the moment the image was processed on social media without the Complainant's consent. The Respondent remains liable for this breach, notwithstanding its subsequent removal of the images.
50. 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.
51. The Complainant sought various remedies including that the Respondent takes down the post from its public platforms and compensation.
52. Having found that the Respondent is not able to prove that it obtained express consent from the Complainant for the use her image on its public social media platforms, the Respondent is hereby directed to compensate the Complainant the

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amount of **Kshs. 500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only)** for the use of the Complainant's image for commercial purposes without express consent.

G. FINAL DETERMINATION

53. 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 **Kshs. 500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only)** 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 17th day of December 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

KENYA

