



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1463 OF 2024

ALICE KAMANDE.....COMPLAINANT

-VERSUS-

BONFACE MWANGI WAHOME

T/A SIR BONNIE BRANDS.....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 Complainant filed a complaint on 3rd October, 2024 alleging that the Respondent used her image to advertise and promote a fashion design course on its Facebook page, without obtaining her 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 as '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 (hereinafter as '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 3rd October, 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by Wamae & Allen LLP Advocates on behalf of the Complainant, who was an 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 16th October 2024 and referenced ODPC/CONF/1/5 VOL II (257). In the Notification of the Complaint, the Respondent was informed that if the allegations by the Complainant were true, it was in violation of various provisions of the Act. Further, the Respondent was asked to provide this Office with the following: -
 - a. A response to the allegations made against it by the Complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. Details on how it obtained the Complainant's image;
 - d. The contractual agreement with the Complainant, if any;
 - e. Whether the Complainant was notified and expressly consented to the use of her image for commercial purposes;

- f. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant; and
 - g. Any other information it wishes the Office to consider.
8. The Respondent was non-responsive and did not submit a response to the Notification of Complaint. Regulation 11(2) of the Enforcement Regulations states that, *"where a respondent does not take any action as contemplated in the notification of complaint, the Data Commissioner shall proceed to determine the complaint in accordance with the Act and the Enforcement Regulations."*
9. This determination is therefore as a result of analysis of the complaint as received and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

10. The Complaint relates to the alleged use of the Complainant's image for commercial purposes without obtaining her consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant alleged that on or about 17th August 2024, she learned that the Respondent used her image, without her consent, to advertise and promote a fashion design course in its social media on the Facebook/META platform which has a total of 23,000 Followers.
12. The advertisement by the Respondent was geared towards soliciting clients for commercial gain and marketing its fashion design course at the expense of the Complainant who is a well-known Kenyan Artist, Song Writer, founder of Dare Dream Girl Motivational Programme, Fashion Designer and a reputable public figure with a huge following on the social media platforms. TO WIT:
- a) On Facebook/META, the Complainant is known by the Username Alice Kamande and has 74,000 Followers.
 - b) On Instagram, the Complainant is known by the Username alicekamande/Alice Kamande and has 134,000 Followers.

- c) On her YouTube Channel, the Complainant is known by the Username Alice Kamande TV and has 9,075 Followers. She has currently posted 19 videos on the platform which has a total of 1,657,354 Views.
- d) On X (formerly Known as Twitter), the Complainant is known by the username ALICEKAMANDE1 and has 541 Followers.

13. The Complainant averred that the Respondent was unlawfully taking advantage of the Complainant's immense following to publicize its fashion design course by hoodwinking her followers on Facebook/META Platform that she was promoting its commercial activities.
14. The Complainant stated that upon this discovery of violation of her privacy, she contacted the Respondent in a bid to have the image pulled down from its social media platform, for the Respondent to accept liability for violating her right to privacy by use of her image without her consent and for compensation. However, the Respondent claimed that the image was purportedly free for use from the Internet and that the image did not belong to the Complainant.
15. Later, the Complainant discovered that the Respondent had pulled down the image from the social media page upon being confronted. Suffice to point out, the Respondent never admitted liability nor was compensation granted to the Complainant despite usage of her image for marketing and commercial purposes.
16. The Complainant averred that the actions by the Respondent amount to a violation of the Complainant's right to privacy and right to human dignity as protected under Article 31(a) & (c) & 28 of the Constitution of Kenya which give one right not to have information relating to their private affairs unnecessarily revealed.
17. Further, the actions by the Respondent grossly contravened Section 37 of the Data Protection Act by using the Complainant's image for commercial use without having obtained express consent as required by the law.
18. The Respondent blatantly contravened Part III of the Data Protection (General) Regulations, 2021 on Commercial Restrictions over the usage of personal data

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during direct marketing by failing to notify the Complainant of the usage of her personal data for marketing purposes on its Facebook/META platform and by failing to obtaining the Complainant's consent to the use and disclosure of her personal data for commercial and marketing purposes on its Facebook/META platform.

19. The Complainant asserted that the Respondent, by using her image for marketing and commercial advertisement, breached her right to be protected against intrusion into her personal life or affairs, or those of her family, by direct physical means or by publication of personal information.

20. The Complainant sought the following remedies: -

- a) A declaration that the Respondent breached the fundamental right of the Complainant to privacy contrary to Article 31(c) and (d) of the Constitution of Kenya 2010, by revealing the private affairs and by publishing her image for purpose of the commercial advertisement of its Fashion Design Course on the Facebook/META Platform without her express consent.
- b) A declaration that the Complainant's intellectual property rights, right of publicity and personality rights were infringed when the Respondent decided to publish the Complainant's image in advertising and marketing the fashion design course on the Facebook/META Platform for financial gain without seeking authority/consent from the Complainant contrary to Section 37(1) of the Data Protection Act.
- c) A declaration that the Respondent violated the Complainant's rights by publishing her image and likeness for its own commercial gain with no personal financial advantage gained by the Complainant.
- d) An order be issued against the Respondent from using and/or publishing the Complainant's image and likeness in its advertisement and/or promotion for its fashion design course in any way without the Complainant's consent as provided for under the Data Protection Act.
- e) An order of compensation in the form of general damages, directed at the Respondent for violating the Complainant's fundamental right to

privacy under Article 31 of the Constitution of Kenya by publishing the Complainant's image for purposes of commercial advertisement without her consent.

21. The Complainant provided the following documents as evidence: -

- a) Certified copies of Sir Bonnie Brands' Registration certificate obtained from BRS.
- b) Copies of Screenshots of the Respondent's Facebook/META page.
- c) A copy of the Complainant's image illegally used by the Respondent.
- d) Copies of Screenshots of the Complainant's Social Media Pages.

ii. THE RESPONDENT'S RESPONSE

22. The Respondent did not submit a response to the Notification of Complaint. Therefore, the allegations made in the Complaint remain uncontroverted.

F. INVESTIGATIONS UNDERTAKEN

23. The Office analysed the complaint as lodged and the supporting evidence.

24. The Office visited the Respondent's Facebook page by the name 'Sir Bonnie Brands' and did not find the Complainant's image published there.

G. ISSUES FOR DETERMINATION

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

- i. Whether there was a violation of the Complainant's rights under the Act;
- ii. Whether the Respondent fulfilled its obligations under the Act; and
- iii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

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

26. Section 26(a) of the Act provides for the right of a data subject to be informed of the use to which their personal data is to be put. The Respondent did not inform the Complainant that her image was going to be used for marketing

purposes on its Facebook page, therefore violated the Complainant's right to be informed.

27. Section 40(1)(b) of the Act provides for the right of erasure and states that, "a data subject may request a data controller or data 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. The Complainant alleged that upon discovery of the violation of her privacy, she contacted the Respondent in a bid to have the image pulled down from its social media platform, hence exercised her right of erasure of her personal data. The Complainant did not provide any evidence indicating that she exercised her right of erasure of her personal data as alleged.

29. From the foregoing, this Office finds that the Complainant's right to be informed of the use to which her personal data was to be put was violated by the Respondent.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

30. The Respondent is a data controller within the definition of the Act and therefore has obligations pursuant to the Act.

26. Section 29 of the Act provides an obligation to data controllers or data processors of the duty to notify the data subject. Notably, the data subject has to be informed of, *inter alia*;

- i. rights specified under Section 26;
- ii. the fact that personal data was being collected;
- iii. the purpose of collection of their personal data;
- iv. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

The Respondent had a duty to notify the Complainant of her rights under the Act, the fact that it had collected her image and was going to use it to promote

a fashion and design course on Facebook, and the measures it has in place to ensure safety of her personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

27. Section 37(1) of the Act 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."***

28. Regulation 14(1) of the General Regulations provides the interpretation of 'commercial purposes' and provides that for the purposes of Section 37(1) of the Act, a data controller or data 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.

29. The Respondent's act of publishing the Complainant's image on its Facebook page was intended to attract clients to register for its fashion and design course, who would in turn pay a fee for the course offered by the Respondent. The Respondent stood to benefit commercially from the use of the Complainant's image.

30. The conditions of consent are provided under Section 32 of the Act which provides that a data controller shall bear the burden of proof to establish that the data subject consented to the processing of their personal data for a specified purpose. The Respondent was non-responsive and therefore did not prove that it obtained consent to process the Complainant's personal data.

31. From the foregoing, this Office finds that the Respondent failed to fulfil its obligations under the Act.

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

32. 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.

33. The Complainant prayed for a declaration that:

- a) The Respondent breached the fundamental right of the Complainant to privacy contrary to Article 31(c) and (d) of the Constitution of Kenya 2010, by revealing the private affairs and by publishing her image for purpose of the commercial advertisement of its Fashion Design Course on the Facebook/META Platform without her express consent.
- b) The Complainant's intellectual property rights, right of publicity and personality rights were infringed when the Respondent decided to publish the Complainant's image in advertising and marketing the fashion design course on the Facebook/META Platform for financial gain without seeking authority/consent from the Complainant contrary to Section 37(1) of the Data Protection Act.
- c) The Respondent violated the Complainant's rights by publishing her image and likeness for its own commercial gain with no personal financial advantage gained by the Complainant.

34. A declaration is not one of the remedies provided for in Regulation 14(3) of the Enforcement Regulations and therefore the above prayers are declined.

35. The Complainant prayed for an order to be issued against the Respondent from using and/or publishing the Complainant's image and likeness in its advertisement and/or promotion for its fashion design course in any way without the Complainant's consent as provided for under the Data Protection Act. **The Respondent is hereby ordered to stop publishing the Complainant's image in its promotion of its fashion design course without obtaining prior consent from the Complainant.**



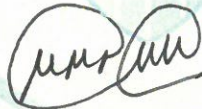
36. The Complainant also prayed for an order of compensation in the form of general damages, directed at the Respondent for violating the Complainant's fundamental right to privacy under Article 31 of the Constitution of Kenya by publishing the Complainant's image for purposes of commercial advertisement without her consent.
37. Section 65 of the Act provides for compensation to data subjects and states, "*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.*"
38. Section 65(4) of the Act states that, "*damage includes financial loss and damage not involving financial loss, including distress.*"
39. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
40. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's personal data was used for commercial purposes without obtaining her consent. Further, the Office considers the fact that the Respondent either intentionally or negligently violated the Complainant's right to be informed of the use to which her personal data was to be put.
41. The Respondent is hereby ordered to pay the Complainant **Kenya Shillings seven hundred and fifty thousand (KES. 750,000)** as compensation for the violation of the Complainant's right to be informed and for the use of the Complainant's personal data for commercial purposes without her express consent
42. The Respondent is directed to put in place clear consent mechanisms and seek prior consent before publishing a data subject's image on its social media page(s). The consent mechanism should also provide for withdrawal of consent and should be acted upon within the timelines stipulated under the Act and the Data Protection (General) Regulations, 2021.

H. FINAL DETERMINATION

43. The Data Commissioner therefore makes the following final determination:

- i. The Respondent is found liable for violating the Complainant's right to be informed of the use to which her personal data was to be put and for use of the Complainant's personal data for commercial purposes without obtaining her consent.
- ii. The Respondent is hereby ordered to stop publishing the Complainant's image in its promotion of its fashion design course without obtaining prior consent from the Complainant.
- iii. The Respondent is hereby ordered **to pay the Complainant Kenya Shillings Seven Hundred and Fifty Thousand (KES. 750,000) as compensation.**
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 19th day of December 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

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