



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1517 OF 2024

CHARLES CHARAGU KINYUACOMPLAINANT

-VERSUS-

CALLTRONIX KENYA LIMITED.....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 posted the Complainant's image on Instagram, without his knowledge and 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 29th 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 16th October, 2024 referenced ODPC/CONF/1/5 VOL II (256). 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;
 - b) Any relevant materials or evidence in support of its response;
 - c) The contractual agreement with the Complainant;
 - d) Whether the Complainant was notified and expressly consented to the use of his image for commercial purposes;
 - e) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
 - f) Any other information you wish the Office to consider.

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8. The Respondent responded to the allegations made against it *vide* a letter dated 30th October, 2024.

D. NATURE OF THE COMPLAINT

9. The Complainant alleged that the Respondent, without his consent or any other lawful basis thereof, collected, processed and used his image on its Instagram, a social media platform.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

10. The Complainant alleges that the Respondent, who is his employer used his photographs on the company's Instagram account to advertise, market, and promote its services without his consent. The photos were uploaded on two separate occasions on 2nd August 2024 and 2nd September 2024. The Complainant states that he was not informed or asked for permission before these posts were made.

11. The Complainant stated that he personally submitted the photo together with other documents to the Respondent during employment onboarding. The specific purpose of the image was to be used in the Intranet, i.e. creating an official profile of the staff.

12. The Complainant further alleges that he became aware of this fact on 23rd September, 2024 after receiving threatening messages on his X (formerly Twitter) account. The Complainant believes that the unauthorized use of his image has contributed to the harassment he has since experienced.

13. As evidence, the Complainant attached two screenshots of the Respondent's Instagram page showing the two occasions his image was posted.

i. THE RESPONDENT'S RESPONSE

14. The Respondent in its statement of response stated that it takes matters concerning data protection and employee privacy very seriously, and they are committed to resolving this issue in compliance with the Act.

15. The Respondent also stated that the mitigation measure that they have put in place is their staff have signed the photography consent forms.

16. With regard to the use of the Complainant's image on its Instagram page, the Respondent pleads that the post was promptly removed following his initial concern.

17. The Respondent further enclosed a copy of the company's disclaimer currently in place.

F. ISSUES FOR DETERMINATION

18. It is undisputed that the Respondent used the Complainant's image on its Instagram page.

19. 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 fulfilled its obligations under the Act;
- 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 FULFILLED ITS OBLIGATIONS UNDER THE ACT.

20. Contextually speaking, to fully canvass this issue, this Office shall address this by answering the following questions:-

- a. Has the Respondent established a lawful basis for processing the Complainant's personal data?
- b. Did the Respondent process the Complainant's personal data in accordance with the principle of purpose limitation?
- c. Does the disclaimer satisfy the requirements for the Duty to Notify?

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Has the Respondent established a lawful basis for processing the Complainant's personal data?

21. Section 30 of the Data Protection Act provides the lawful bases for processing personal data. It provides:-

30. Lawful processing of personal data

(1) A data controller or data processor shall not process personal data, unless

(a) the data subject consents to the processing for one or more specified purposes;

or

(b) the processing is necessary-

(i) for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject before entering into a contract;

(ii) for compliance with any legal obligation to which the controller is subject;

(iii) in order to protect the vital interests of the data subject or another natural person;

(iv) for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(v) the performance of any task carried out by a public authority;

(vi) for the exercise, by any person in the public interest, of any other functions of a public nature;

(vii) for the legitimate interests pursued by the data controller or data processor by a third party to whom the data is disclosed, except if the processing is unwarranted in any particular case having regard to the harm and prejudice to the rights and freedoms or legitimate interests of the data subject; or

(viii) for the purpose of historical, statistical, journalistic, literature and art or scientific research.

(2).....

22. The above-stated are the lawful bases upon which the data controller, the Respondent herein, should have processed the Complainant's personal data.

23. The requirement to establish a lawful basis was particularly key, there being an employer-employee relationship between the Complainant and the Respondent.

24. In its response the respondent did not establish the lawful basis for processing the Complainant's personal data in the manner it was processing i.e. placing the Complainant's photographs on the company's Instagram account.

Did the Respondent process the Complainant's personal data in accordance with the principle of purpose limitation?

25. Section 25 of the Act provides for the principles of data protection as follows:-

"Every data controller or data processor shall ensure that personal data is:-

- i) Processed in accordance with the right to privacy of the data subject;*
- ii) Processed lawfully, fairly, and in a transparent manner in relation to any data subject;*
- iii) Collected for explicit, specified, and legitimate purposes and not further processed in a manner incompatible with those purposes; adequate, relevant, limited to what is necessary in relation to the purposes for which it is processed;*
- iv) collected only where a valid explanation is provided whenever information relating to family or private affairs is required;*
- v) accurate and, where necessary, kept up to date, with every reasonable step being taken to ensure that any inaccurate personal data is erased or rectified without delay;*
- vi) kept in a form which identifies the data subjects for no longer than is necessary for the purposes which it was collected; and*
- vii) not transferred outside Kenya, unless there is proof of adequate data protection safeguards or consent from the data subject. [emphasis supplied]*

26. Regulation 31 of the Data Protection (General) Regulations 2021 further expound on the elements for principle of purpose limitation as follows:-

31. Elements for principle of purpose limitation

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The elements necessary to implement the principle of purpose limitation include-

- (a) Specifying the purpose for each processing of personal data;*
- (b) determining the legitimate purposes for the processing of personal data before designing organizational measures and safeguards;*
- (c) the purpose for the processing being the determinant for personal data collected;*
- (d) ensuring a new purpose is compatible with the original purpose for which the data was collected;*
- (e) regularly reviewing whether the processing is necessary for the purposes for which the data was collected and test the design against purpose limitation; and*
- (f) the use of technical measures, including hashing and cryptography, to limit the possibility of repurposing personal data.*

27. The above provisions provide the guidelines within which the Respondent should apply in the processing of the personal data within its custody and control.

28. Related to the Complaint, the Complainant contended that he personally submitted his photo together with other documents to the Respondent during employment onboarding. To the Complainant, the specific purpose of the image was to be used in the Intranet, i.e. creating an official profile of the staff. The Respondent on its part did not respond to this contention. As such, it remains uncontroverted.

29. It is therefore our finding that by the Respondent using the Complainant's personal data on its Instagram social media platform, it acted *ultra vires* the purpose for which it was collected. It exceeded the purpose and abrogated the principle of purpose limitation.

Does the disclaimer satisfy the requirements for the duty to notify?

30. In its response the Respondent stated that it had put in place a disclaimer notice at its premises. It further adduced the disclaimer notice.

31. The contents of the adduced disclaimer notice are as follows:-

"Dear All

Please be advised that by entering our premises, you consent to the possibility of photography, audio, and video recording. Calltronix Kenya Limited may capture images and recordings that include your image and voice.

These materials may be used in our social media, marketing efforts, and other official publications to promote the services and activities of Calltronix Kenya Limited. This usage will adhere to our internal privacy policy.

If you remain on the premises, you acknowledge and consent to this photography and videography and the subsequent use of these media.

We are dedicated to protecting your personal data. For any questions or concerns regarding this policy, please reach out to management.

Thank you for understanding.

By Management."

32. Section 29 of the Act provides for the Respondent's duty to notify and provides that " a data controller or data processor shall before collecting personal data, in so far as practicable, inform the data subject of:-

- a) *the rights of data subject specified under section 26;*
- b) *the fact that personal data is being collected;*
- c) *the purpose for which the personal data is being collected;*
- d) *the third parties whose personal data has been or will be transferred to, including details of safeguards adopted;*
- e) *the contacts of the data controller or data processor and on whether any other entity may receive the collected personal data;*
- f) *a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data;*
- g) *the data being collected pursuant to any law and whether such collection is voluntary or mandatory; and*
- h) *the consequences if any, where the data subject fails to provide all or any part of the requested data." [emphasis supplied]*

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33. Our interrogation of the Respondent's disclaimer notice in light of the above legal provision, it is evident that it does not satisfy the requirements for the duty to notify. The disclaimer falls short of these legal requirements.

34. Further relating to consent we would like to note that 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 relating to the data subject."

35. The Act goes further to state the conditions of consent. It states as follows with regard to 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.

(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 supplied]

36. Further Regulation 4 of the Data Protection (General) Regulations, 2021 expounds on processing on the basis of consent as follows:-

4. Processing on the basis of consent

(1) where processing is based on consent in accordance with section 32 of the Act, a data controller or data processor shall, in seeking consent prior to the processing, inform the data subject of-

(a) the identity of the data controller or data processor;

- (b) the purpose of each of the processing operations for which consent is sought;
- (c) the type of personal data that is collected and used;
- (d) information about the use of the personal data for automated decision-making, where relevant;
- (e) the possible risks of data transfers due to absence of an adequacy decision or appropriate safeguards;
- (f) whether the personal data processed shall be shared with third parties;
- (g) the right to withdraw consent; and
- (h) the implications of providing, withholding or withdrawing consent.
- (2) The information under sub-regulation (1) may be presented to the data subject through a written notice, oral statement, audio or video message.
- (3) In obtaining consent from a data subject, a data controller or a data processor shall ensure that the—
- (a) data subject has capacity to give consent;
- (b) data subject voluntarily gives consent; and
- (c) consent is specific to the purpose of processing.
- (4) Pursuant to section 32(4) of the Act, consent shall be considered to have been given freely, unless where —
- (a) it is presumed on the basis that the data subject did not object to a proposal to processing of their personal data in a particular manner;
- (b) it is presented as a non-negotiable part of the terms and conditions for processing;
- (c) the data subject is unable to refuse or withdraw their consent without detriment;
- (d) the data controller or data processor merges several purposes for processing without seeking specific consent for each purpose; or
- (e) the intention of the data subject is ambiguous.
- (5) Where the data subject withdraws consent to any part of the processing, the data controller or data processor shall restrict the part of the processing in respect of which consent is withdrawn, subject to section 34 of the Act.

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37. In a nutshell, the above legal provisions provide guidance to data controllers and processors to abide by when it comes to relying on consent as the lawful basis for processing of personal data.

38. Related to the Complaint, as is discernible from the above contents of the Respondent's disclaimer notice reproduced above, the Respondent purports that by one entering into its premises one consents to the use of the images for photography, audio, and video recording. The disclaimer also states that one will have also consented to the use of the recorded materials for marketing and advertisement.

39. This Office wishes to emphasize that the alleged disclaimer does not satisfy the conditions for valid consent as set out in the Act. The Respondent cannot process individuals' personal data in reliance on the contents of the disclaimer notice as the basis for consent.

40. Having considered all the above, it is therefore our finding that the Respondent did not fulfill its obligations under the Act.

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

41. Section 26 of the Act provides for the rights of a data subject as follows:-

26. Rights of a data subject

A data subject has a right-

- (a) to be informed of the use to which their personal data is to be put;*
- (b) to access their personal data in custody of data controller or data processor;*
- (c) to object to the processing of all or part of their personal data;*
- (d) to correction of false or misleading data; and*
- (e) to deletion of false or misleading data about them. [Emphasis supplied]*

42. Having found that the Respondent exceeded the purpose within which it collected the Complainant's personal data, it, therefore, follows that the Complainant was not adequately informed of the use of his personal data. The Complainant was



only informed that his personal data will be used for employment purposes. He was not informed that the same will be used for other purposes.

43. This Office, therefore, finds that the Respondent violated the Complainant's right to be informed of the use to which his personal data was to be put.

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

44. 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.

45. Having considered the merits of the Complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent violated the Complainant's rights and it did not fulfil its obligations under the Act, it, therefore, follows that there has been a violation of the Act by the Respondent.

46. 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.

47. 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.

48. The Complainant claimed for the remedy of compensation for the damage incurred due to the Respondent's gross violation. The Respondent did not make any representations concerning the Complainant's claim.

49. Having found that the Respondent violated the Complainant's rights and it did not fulfil its obligations under the Act, the Respondent is hereby directed to compensate the Complainant the amount of **KES. 450,000/= (Four Hundred and Fifty Thousand Kenya Shillings Only)** for use of the Complainant's image

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without a lawful basis and violation of the Complainant's right to be informed of the use to which his personal data would be put.

50. In addition, Section 58 of the Act as read together with Regulations 14 and 16 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 further contemplates, as a remedy, the issuance of enforcement notices against an entity that has failed or is failing to comply with any provisions of the Act and the attendant regulations thereto.

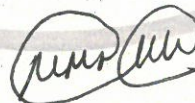
51. Having found that the Respondent processed the Complainant's personal data without a lawful basis and in violation of the principle of purpose limitation and did not fulfil its duty to notify, this Office is guided accordingly and an Enforcement Notice hereby ensues as against the Respondent.

I. FINAL DETERMINATION

52. In the ultimate, the Data Commissioner makes the following final determination;

- i. The Respondent is hereby found liable.
- ii. The Respondent to pay the Complainant a sum of **KES. 450,000/= (Four Hundred and Fifty Thousand Shillings Only)** as compensation.
- iii. An Enforcement Notice is hereby issued against the Respondent.
- 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**

