



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1255 OF 2024

CAROLINE JEDIDAH MAKAU.....COMPLAINANT

-VERSUS-

GROLA TECH LIMITED T/A LIONCASH.....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 lodged a complaint on 21st August 2024 alleging that the Respondent has been repeatedly calling her, demanding payment for a loan that she never obtained.

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 (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 on 21st August 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by 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 3rd September 2024 and referenced ODPC/CONF/1/5 VOL II(157). 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) Its contractual obligation with the Complainant, if any;
 - d) A detailed procedure on how data subjects can exercise their data protection rights;
 - e) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint does not take place again; and
 - f) Any other relevant information it wishes the Office to consider.

8. The Respondent was non-responsive and did not respond to the Notification of Complaint filed against it. 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 this office.

D. NATURE OF THE COMPLAINT

10. The Complaint relates to the alleged contacting of the Complainant regarding a loan that she was not a party to, and had not consented to be enlisted as a referee/contact person.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

11. The Complainant stated that the Respondent called her using mobile phone number 0794****71 demanding for payment of a loan obtained by N***** W*****, yet she was not the one who borrowed the money. She provided screenshots of her call log as proof.
12. Further, the Complainant stated that the Respondent did not call her before disbursing the loan.
13. The Complainant stated that the calls were becoming a nuisance as they called her line 27 times on 20th August 2024 and 51 times between 6.13 am and 7.19 am.
14. In conclusion, the Complainant stated that she wanted the Respondent to stop calling her number since she was not involved in their lending out.

ii. THE RESPONDENT'S RESPONSE

15. The Respondent was non-responsive and did not respond to the Notification of Complaint filed against it.

F. ISSUES FOR DETERMINATION

16. The following issues fall for determination by this Office: -

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- 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

17. The Complainant is a data subject as per the definition under the Act and has rights as provided for under the Act. Section 26(a) of the Act provides for the right to be informed of the use to which a data subject's personal data is to be put.

18. The Respondent, by not informing the Complainant of the use to which her personal data was to be put, at the point of collection of the personal data, violated her right to be informed. The Respondent collected the mobile phone number of the Complainant from a third party and did not inform her that her personal data was being collected. The Respondent did not also inform the Complainant that her mobile phone number was being collected for the purpose of being listed as a referee/contact person to a loanee and did not give the Complainant an opportunity to consent to the listing.

19. From the above, 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

20. The Respondent is a data controller as per the definitions of the Act and is therefore mandated to fulfil its obligations as such under the Act.

21. The Respondent had an obligation under Section 25 of the Act to ensure that the Complainant's personal data is, amongst others:

- i. processed in accordance with their right to privacy;
- ii. processed lawfully, fairly and in a transparent manner in relation to the data subjects;

- iii. collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes; and
- iv. collected only where a valid explanation is provided whenever information relating to private affairs is required.

22. In collecting personal data, the Respondent is mandated by Section 28(1) of the Act to collect the data directly from the data subject. Section 28(2) sets out instances where personal data may be collected indirectly. The Respondent did not demonstrate that any of the conditions set out in Section 28(2) were relevant in this matter.

23. Further, 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. the third parties whose personal data has been or will be transferred to, including details of the safeguards adopted; and
- v. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

24. The Respondent had a duty to notify the Complainant of her rights under the Act, the fact that her mobile phone number was being collected for purposes of listing her as a referee/contact person to a loanee, and the measures it has in place to ensure the safety of his personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

25. Section 30 of the Act states 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. The Respondent did not obtain consent from the Complainant before processing her personal data.

26. From the above, this Office finds that the Respondent did not fulfil its obligations provided for under the Act.

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

27. 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 sought this Office's intervention for the Respondent to stop calling her.

28. 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.

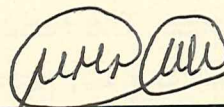
29. Having found that the Respondent violated the Complainant's rights as provided for under the Act, and that it did not fulfill its obligations provided for under the Act, the Office hereby orders for an enforcement notice to be issued against the Respondent.

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for violating of the Complainant's right to be informed of the use to which her personal data is to be put and for non-compliance with its obligations under the Act;
- ii. An Enforcement Notice to issue against the Respondent; and
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 18th day of November 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**