



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1176 OF 2024

FERDINAND OMANYALA OMURWA..... COMPLAINANT

-VERSUS-

MULTICHOICE KENYA LIMITED.....1ST RESPONDENT

NATIONAL OLYMPICS COMMITTEE OF KENYA.....2ND 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. This Complaint is in respect of the Complainant's claim that the 1st Respondent used his image commercially to market and advertise the Paris 2024 Olympics in their social platforms and bill boards across the country without the Complainant's consent.

B. LEGAL BASIS

2. Article 31 (c) and (d) of the Constitution of Kenya 2010 provides for the right to privacy. Consequently, to further guarantee the same, the Data Protection Act, 2019 (hereinafter 'the Act') was enacted.
3. The Office of the Data Protection Commissioner (hereinafter 'this Office' 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.

C. BACKGROUND

5. The Office received a complaint dated 2nd August, 2024 by Ferdinand Omanyala Omurwa (hereinafter 'the Complainant'), on the same day, pursuant to Section 56 of the Act and Regulation 4 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter the 'Enforcement Regulations') from the Complainant who is the aggrieved data subject.
6. From the complaint form, Form DPC 1, the Complainant had cited the 1st Respondent as the Respondent.
7. Pursuant to Regulation 11 of the Enforcement Regulations, on 13th August 2024, this Office notified the 1st Respondent of the complaint filed against it *vide* a letter referenced ODPC/CONF/1/5 VOL II (91) and required its response within 21 days.
8. The 1st Respondent, through their Advocates, responded to the notification of the complaint letter on 4th September 2024.
9. In their response, the 1st Respondent contended that the Complainant had brought action against them wrongfully as it had entered into a collaboration agreement with the National Olympic Committee of Kenya (NOC-K) which had the right to promote the Olympics and the Team Kenya athletes who participated in the 2024 Paris Olympics. It was the 1st Respondent's position that its use of the Complainant's image was done in line with the provisions of the said collaboration agreement and on account of the rights granted by the NOC-K who in turn had obtained such authority directly from the Complainant.

10. On 9th October 2024, based on the above assertions, the Data Commissioner exercising her powers as envisaged under Regulation 12(1) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 enjoined the 2nd Respondent, National Olympic Committee of Kenya (NOC-K), as the 2nd Respondent in this complaint.
11. Regulation 12 (1) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations 2021 provides that where it appears to the Data Commissioner, or by application by either the Complainant or the Respondent, that it is necessary that a person becomes a party to a complaint, the Data Commissioner may order that person to be enjoined as a party. [Emphasis supplied].
12. The decision to enjoin the 2nd Respondent, NOC-K, as a Respondent in this matter was informed upon it on 9th October 2024. On the said notice to enjoin, the complaint was attached and the 2nd Respondent was required to respond to the Complaint within 21 days.
13. As at the date of this determination, the 2nd Respondent has neither provided any substantive response and/or defence to the Complainant's allegations nor any evidence to contravene the 1st Respondent's position as stated in paragraph 9 above. The Complaint remains uncontroverted as far the complaint against the 2nd Respondent is concerned.
14. This determination is therefore a result of analysis of the complaint as received, the 1st Respondent's response, and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

15. The Complainant alleged that the 1st Respondent, without his consent and/ or justifiable cause, used his images for advertisement on its social media platforms and several billboards within Nairobi county.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

16. The Complainants lodged the complaint through their advocates pursuant to Regulation 4 (3) of the Enforcement Regulations which state that a complaint may be lodged by a person acting on behalf of the Complainant.
17. It was the Complainant's contention that the 1st Respondent used his images for advertisement on its social media platforms and bill boards erected in different parts of the country without the Complainant's consent.
18. The Complainant stated that sometime on or about 17th July 2024, he received a picture of a Billboard with his image, picture and likeness erected along Kiambu from his partner, who was driving along Kiambu road on the said date.
19. That upon further inquiry, he established that MultiChoice Kenya Limited erected a billboard with his image and likeness in various platforms and parts of the country and more specifically at Ridgeways Mall, opposite Vessay Tile and along Jogoo Road just before Makadara Estate.
20. The Complainant further stated that MultiChoice Kenya through its subsidiaries including Dstv Kenya, Showmax Kenya and GOtv Kenya published the Complainant's images and likeness without his express consent, authority or licence thereby violating his right to privacy and intellectual property.
21. The Complainant contended that the 1st Respondent's conduct of using the Complainant's images and likeness in the publication of the billboards and advertisement posts on social media platforms to market the products of MultiChoice Kenya and for commercial purposes without his consent is in total violation of the Complainant's privacy rights under Article 31 of the constitution and the Data Protection Act.
22. The Complainant further contended that neither the collaboration agreement between the Respondents nor the Athletes code of conduct permitted the marketing or use of his images and likeness to advertise the 1st Respondent's products.

23. As part of his evidence, the Complainant adduced electronic evidence of the impugned billboards and the 1st Respondents subsidiaries' social media accounts.

ii. THE FIRST RESPONDENT'S RESPONSE

24. The Respondent in its response received by this Office on 4th September 2024 stated that on or about May 2024, it entered into a Collaboration Agreement with the 2nd Respondent, National Olympic Committee of Kenya (NOC-K) which has the right to promote the Olympics and the Team Kenya athletes who participated in the recently concluded 2024 Paris Olympics.

25. The 1st Respondent stated that it is on account of its collaboration with the 2nd Respondent that it was officially designated as a sponsor of Team Kenya Olympics 2024.

26. The 1st Respondent further stated that under the Collaboration Agreement the 2nd Respondent's obligations included:-

- a. Providing to the Respondent the right to use the Team Kenya Intellectual Property including image rights, copyright, trademark rights and names, nicknames, publicity, and likeness on a variety of media platforms in its promotion and marketing.
- b. The 2nd Respondent undertook to procure all necessary consents and approvals from the members of Team Kenya.
- c. Provision to the Respondent of Team Kenya images and clips of marathon races during the Olympics period.
- d. The 2nd Respondent granted the 1st Respondent access to the athlete's events organized by it and authorized the use of their images on the 1st Respondent's group platforms which include GOtv, DSTv and Showmax.

27. The 1st Respondent further stated that under clause 4.2 of the Collaboration Agreement, the 2nd Respondent acknowledged that it has the authority, clearances and necessary consent for the exploitation of the rights granted/ licensed to the Respondent.



28. The 1st Respondent also contended that as part of its obligations under the collaboration agreement, the 2nd Respondent provided Team Kenya images and clips of Team Kenya athletes for use by the 1st Respondent and part of the images that it had the right to use was that of the Complainant who was part of Team Kenya at the 2024 Paris Olympics.

29. It was the 1st Respondent's position that it used the Complainant's image pursuant to the Collaboration Agreement between it and the 2nd Respondent and on account of the already procured the consent of the Complainant by the 2nd Respondent as per the affirmation and acceptance by the athletes code of conduct.

30. In addition to the response to the Complaint, the 1st Respondent adduced:-

- a) A duly signed Collaboration agreement between it and the 2nd Respondent, National Olympic Committee of Kenya (NOCK),
- b) A copy of the NOC-K Athletes Code of Conduct duly signed by the Complainant.
- c) Its response to the Complainant's demand letter.

F. ISSUES FOR DETERMINATION

31. The undisputed facts in this case is that the Complainant's images, photographs and/or likeness was used by the 1st Respondent in their social media platforms and billboards across the country.

32. Before outlining the issues for determination, we would like to reiterate that the mandate of this Office is restricted to personal data issues as outlined above. The Complainant raised some International Olympic Committee (IOC) charter violations and intellectual property issues which this Office will steer clear of.

33. That being said, the following issues fall for determination by this Office:

- i. Whether the Respondents obtained express consent from the Complainant to process his personal data for commercial purposes; and
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENTS OBTAINED EXPRESS CONSENT FROM THE COMPLAINANT TO PROCESS HIS PERSONAL DATA FOR COMMERCIAL PURPOSES.

34. It was the Complainant's position that the 1st Respondent used his images for advertisement on its social media platforms and bill boards erected in different parts of the country without his consent.

35. It was the 1st Respondent's position that it processed and/or used the Complainant's image pursuant to the Collaboration Agreement between themselves and the 2nd Respondent, and on account of the already procured the consent of the Complainant by the 2nd Respondent as per his affirmation and acceptance by the athletes code of conduct.

36. The Complainant asserted that the NOC-K Athletes Code of Conduct does not disclose that the 1st Respondent had assigned the personal data of the Complainant to the 2nd Respondent and that the code of conduct does not grant any rights to personal data of the Complainant to Multichoice or NOC-K.

37. 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.

38. 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.

39. The Act provides at Section 37 (1) (a) 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.

40. 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.

41. 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 ours)

42. From the evidence adduced to this Office, there was a Collaboration Agreement between the Respondents. The agreement was for collaboration of the two Respondents in relation to the marketing and promotion of the Olympics in the Kenyan territory on the terms and conditions set out in the agreement.

43. Among the terms and conditions of the collaboration agreement include:-

4. The Collaboration

4.1 The NOC's Obligation

4.1.1 Provide MultiChoice with rights to use the NOC Intellectual Property, including but not limited to the official the Olympics Games Marks, the Olympic Symbol, the words "Olympic," "Olympiad," "Olympic Games," and the Olympic Motto "Citius, Altius, Fortius," and other trademarks and trade names in its marketing and promotion of the Olympics;

4.1.2. Provide MultiChoice with the right to use the Team Kenya Intellectual Property, including but not limited to images rights (a minimum of three athletes per images), copyright, trademark rights, and names, nicknames,

publicity and likeliness rights on a variety of media platforms including pay-television, internet, social media, mobile technology, trade material and live-events, in its promotions and marketing. In furtherance to this right, the NOC undertakes to procure all the necessary consents and approvals are obtained from the members of team Kenya.

4.1.3

4.1.9 *grant multichoice with access to athlete's events organized by the NOC and use of their images on the MultiChoice Group platforms;*

4.10.

4.2.1 *Authority. The NOC warrants and represents that it is free to enter into and fully perform its obligations under this agreement and that it has the authority to license the rights licensed by it in this agreement, and that it controls or has obtained or will obtain all rights licensed by it to MultiChoice in this Agreement.*

4.2.2 *Clearances. Subject to the terms of this Agreement, the NOC warrants and represents that it has secured or will secure all necessary rights, permissions or consents for the performance of its obligations under this Agreement, including making available the name and likeness of all athletes, coaches and officials participating in the sporting competitions of the Olympics, subject to the obligations of MultiChoice under this Agreement; provided, that such names and likenesses shall not be used by MultiChoice in any manner other than as permitted under this Agreement. [emphasis supplied]*

44. From the above clauses of the Collaboration Agreement, it was the 2nd Respondent's duty to obtain consent from Team Kenya, which the Complainant was a part of, for the use of the Team Kenya names and likeness in marketing and promotion of the Olympics.

45. The 1st Respondent was acting within the Collaboration Agreement it had with the 2nd Respondent.

46. The 2nd Respondent did not respond to the Notification from this Office and therefore did not provide proof of consent obtained from the Complainant.

47. However, the 1st Respondent provided this Office with a copy of the National Olympic Committee of Kenya (NOC-K) Athletes Code of Conduct which was signed by the Complainant. Part 12 of the said code of conduct provides for media and publicity as follows:-

12. Media and publicity

Athletes agree to be filmed and photographed by the official photographer(s) and network(s) of TEAM KENYA under conditions authorized and

a. Give event organizers and TEAM KENYA the right to use their name, picture, likeness, voice, and biographical information before, during, and after the period of their participation in the promotional activities

b.

48. This was the consent relied upon by the Respondent to process the Complainant's personal data for commercial purposes.

49. However, the Act provides for consent to be 'informed'. Consent must be based on an understanding of the processing activities and its implications on the rights of the data subject. For the Complainant's consent to be said to have been informed, he ought to have been provided with full information regarding his rights, including his right to withdraw consent. The request for consent needed to be prominent, concise, separate from other terms and conditions and in plain language.

50. The Complainant's purported consent contained in the aforesaid code of conduct for the use of his image for commercial purposes was not prominent, concise and separate from other terms of the code of conduct.

51. Further, the part of the Code of Conduct where the Complainant affixed his signature stated as follows –

"I have read and accepted this Code of Conduct. I agree to the rules, guidelines, jurisdiction, and procedures stated in these documents as a condition of being selected to participate as a member of the Team" [Emphasis ours]

52. As stated herein, for consent to be valid, it must be freely given and unconditional. For consent to be 'free', the Complainant must have real choice and control. Any

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element of inappropriate pressure or influence upon the Complainant which prevents him from exercising his free will renders the consent invalid.

53. The fact that the Complainant's consent was a condition of being selected to participate as a member of the Team then means that the same did not meet the conditions of consent spelt out in Section 32 of the Act. As demonstrated hereinbefore, the Complainant would have endured negative consequences if he did not consent to the use of his image by the 2nd Respondent.

54. As such, it is this Office's considered finding that the alleged consent by the Complainant for the Respondents to use his image for commercial purposes was invalid as it did not meet the conditions for consent envisaged under Section 32(1) as read with Section 2 of the Act.

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

55. Under 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.

56. Having considered the merits of the complaint, the evidence adduced, and having found that the 2nd Respondent did not obtain valid consent from the Complainant to use his images for commercial purposes, it therefore, follows that there has been a violation of the Act by the 2nd Respondent to that extent. The obligation to obtain valid consent under the Collaboration Agreement between the 1st and 2nd Respondents rested on the 2nd Respondent.

57. The Complainant sought various remedies, including a declaration of violation of the right to privacy, an order for compensation in the amount of KES 20,000,000 and an Enforcement Notice to issue against Multichoice Kenya, Dstv Kenya, Showmax Kenya & Gotv Kenya.

58. 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. 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.

59. Having found that the 2nd Respondent did not obtain valid consent from the Complainant for the use of his image for commercial purposes, the 2nd Respondent is hereby directed to compensate the Complainant the amount of **KES 500,000 (Kenya Shillings Five Hundred Thousand Shillings)**.

G. FINAL DETERMINATION

60. In the ultimate, the Data Commissioner therefore makes the following final determination:

- i. The Complaint against the 1st Respondent is dismissed.
- ii. The 2nd Respondent is hereby found liable for failure to obtain valid consent for the use of the Complainant's personal data for commercial purposes.
- iii. The 2nd Respondent is ordered to compensate the Complainant **KES 500,000 (Kenya Shillings Five Hundred Thousand Shillings Only)**.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 30th day of October 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER