



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1259 OF 2024

PHIDALE CASTRO MAJIWA OUMA.....COMPLAINANT

-VERSUS-

WHITEPATH COMPANY 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 Complainant filed a complaint against the Respondent alleging the Respondent's unauthorized use of his information. The Complainant alleged that he has been receiving numerous incessant calls and messages from the Respondent demanding payment from them as a loan guarantor yet he has never guaranteed anyone loans with the Respondent.

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 COMPLAINTS

6. This Office received a complaint from the Complainant on 22nd 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 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* letters dated 11th September 2024. The notification letter was referenced ODPC/CONF/1/5 VOL II (175). The Office in the said Notification of Complaint for the complaints requested the Respondent to furnish the Office with –
 - a) A response to the allegations made against it by the Complainant;
 - b) A contact person who can provide further details as regards the complaint;
 - c) Any relevant materials or evidence in support of its response above;
 - d) The lawful basis relied upon to process the Complainant's personal data;
 - e) Evidence as to whether the Complainant consented to the processing of their data;
 - f) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant;

- g) The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again; and
 - h) Any other information it wished the Office to consider.
8. In the interest of fair justice, and pursuant to Regulation 11 of the Data Protection (Complaints Handling Procedures and Enforcement) Regulations, 2021, the Office further informed the Respondent of the options of -
- a. Reviewing the complaint and summarily resolving the same to the satisfaction of the Complainant, or
 - b. Resolving the complaint through mediation, negotiation and/or conciliation, as the alternative dispute resolution (ADR) mechanisms provided for by the Act and the Regulations.
9. The Respondent responded to the said notification letter on 19th September 2024.

D. NATURE OF THE COMPLAINT

10. The Complainant alleged that he has been receiving numerous incessant calls and messages from the Respondent demanding payment from him as a loan guarantor yet he has never guaranteed anyone loans with the Respondent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. It was the Complainant's case that he has continuously been receiving lots of calls and text messages from the Respondent terming him as a referee the Respondent's client who had defaulted in repaying the Respondent's loan.
12. The Complainant contended that he was never informed or consulted by the Respondent when they engaged their client. He further stated his consent was never procured to allow them to spam him with incessant and unwarranted calls. He further alleged that in totality he received more than three hundred (300) messages and almost 200 calls from the Respondent's agents.

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ii. THE RESPONDENT'S RESPONSE

13. The Respondent in its response admitted that one of its agents had contacted the Complainant on numerous times as alleged.

H. ISSUES FOR DETERMINATION

14. The following issues falls for determination by this Office:

- i. Whether the Respondent fulfilled its obligations under the Act; and
- ii. Whether the Complainant is entitled to any remedies.

I. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT.

15. As earlier stated the complaint relates to the unauthorized processing of the Complainant's personal data, by the Respondent. The Complainant alleged that he has been receiving incessant calls from the Respondent demanding loan repayments from him yet he has never guaranteed any loans with the Respondent.

16. The Complainant further contended that the Respondent never informed and or consulted him to agree to be a guarantor to the Respondent's client, when they engaged their client.

17. Section 30 of the Data Protection Act provides the lawful basis for processing personal data. It 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; or the processing is necessary for other purposes set out in Section 30 (1)(b) of the Act.

18. By its admission, the Respondent admitted that one of its employees had contacted the Complainant imploring upon him to repay the loans that he had allegedly guaranteed. The Respondent went further and stated that in addressing the complaint and maintaining its customer information protection initiatives it had taken disciplinary actions against the employee involved. As such, the Complainant's complaint is uncontroverted. The Respondent did not have a lawful basis for processing the Complainant's personal data.

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19. The Respondent did not respond to the Complainant's contention that he was not informed prior to making him a guarantor. It did not provide evidence to the contrary. As such it remains uncontroverted that the Respondent did not dispense away with its duty to notify the Complainant prior to processing his personal data as required by Section 29 of the Act.
20. This Office therefore finds that as far as issue no **(I)** is concerned, the Respondent did not process the Complainant's personal data lawfully and did not notify the Complainant of the processing of his personal data.

II. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDIES.

21. 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.
22. The Complainant requested this Office to award him damages for the unlawful sending of the messages to him by the Respondent and the incessant calls occasioned upon him by the Respondent.
23. 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.
24. 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.
25. Having found that the Respondent did not inform the Complainant prior to obtaining his personal data and it went ahead to process the same unlawfully the Respondent is hereby directed to compensate the Complainant, the sum of **KES 250,000/- (Two Hundred and Fifty Thousand Kenya Shillings Only)**

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable;
- ii. The Respondent is ordered to compensate the Complainant, the sum of **KES 250,000/- (Two Hundred and Fifty Thousand Kenya Shillings Only)**
- iii. 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 November 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

