



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 1349 OF 2024**

**HILDA MUSIMBI ANYAMA**

**(SUING ON BEHALF OF A MINOR LK).....COMPLAINANT**

**-VERSUS-**

**FRIENDS SCHOOL KEVEYE GIRLS HIGH SCHOOL.....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 alleges that the Respondent unlawfully processed the personal data of her niece, a minor, under her guardianship against the principles of data protection. That this alleged action resulted in the unauthorized disclosure of the minor’s personal data to third parties without the Complainant’s knowledge, express consent, or any lawful justification.

**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

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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 9<sup>th</sup> 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 7<sup>th</sup> October, 2024 referenced ODPC/CONF/1/5 VOL II (230). In the notification of the complaint, the Respondent was informed that if the Complainant's allegations were true, they would be in violation of various sections of the Act. Additionally, the Respondent was asked to provide this Office with the following:
  - a) A response to the allegations made against them by the Complainant;
  - b) A contact person who can provide further details as regards this complaint;
  - c) Any relevant materials or evidence in support of your 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 personal data for promotional purposes;
  - f) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
  - g) The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again, if any;
  - h) Any other information they wished the Office to consider.
8. The Respondent responded to the allegations made against it *vide* a letter dated 5<sup>th</sup> December, 2024.

#### **D. NATURE OF THE COMPLAINT**

9. The Complainant alleges that the Respondent unlawfully processed her niece's personal data, a minor under her guardianship, resulting in unauthorized disclosure of the minor's personal data to third parties without her knowledge, consent, or lawful justification. This, she states, was against the original purpose of collection.

#### **E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED**

##### **i. THE COMPLAINANTS' CASE**

10. The Complainant submitted that she has served as the legal guardian of her niece since the age of eight (8), assuming full responsibility for various aspects of her care, including her education. She further asserted that she was solely responsible for facilitating her niece's admission to the Respondent's institution for secondary school studies, a fact supported by records held by the Respondent.
11. The Respondent's Deputy Head Teacher recorded a video of the minor serving a punishment in accordance with school regulations. The Complainant asserts that, without her express consent, prior knowledge, or any lawful basis, the Respondent caused the video to be posted on social media, where it subsequently went viral, leading to widespread exposure of the minor's identity and circumstances.
12. The Complainant asserts that while the minor's punishment may have been warranted, there was no justification or lawful basis for the online exposure of the minor through the dissemination of the recorded video.

13. The Complainant contends that the publication of the video on the internet constitutes a grave violation of the minor's right to privacy. She further alleges that the unauthorized disclosure has subjected the minor to public ridicule and compromised her dignity. The Complainant emphasizes that it was the Respondent's duty to conduct its affairs in a manner that upholds and safeguards the minor's right to privacy, a duty which the Respondent failed to fulfill.

14. As evidence, the Complainant adduced the following: -

- i. The video of the minor as posted on social media.
- ii. Pictures/ screenshots of the viral video taken from different social media platforms.
- iii. A copy of the minor's birth certificate.
- iv. Pictures of a WhatsApp conversation with the minor's class teacher on the issue.

## **ii. THE RESPONDENT'S RESPONSE**

15. The Respondent submitted a response to the Notification of Complaint letter on 5<sup>th</sup> December 2024. They maintained that they had a lawful basis for processing the minor's personal data.

16. The Respondent pleaded that the claim that they shared a video of the minor online is baseless because it does not have an account or participate in any social media activities on sites like Facebook or Twitter (X). Furthermore, the Respondent categorically denies having published or disseminated or caused the publication or dissemination of the said video on Facebook and Twitter (X).

17. The Respondent pleads that it took action to guarantee that the video concerning the school was taken down as soon as they noticed it had been shared on various social media platform including but not limited to Facebook and Twitter (X) without its consent.

18. The Respondent admits that on or about 20<sup>th</sup> July 2024 the video in issue was taken by the Deputy Principal Academics.

19. The Respondent asserts that the video was recorded for legitimate administrative purposes and intended solely for internal use. Specifically, it claims the video was created to collect real-time evidence and to store it for future reference. The Respondent further states that the Deputy Principal shared the video with the Chief Principal, who subsequently shared it with the Executive Parents Teachers Association to provide evidence that school rules were being enforced as agreed.
20. That any actions taken in connection with the processing of the data pertaining to the Complainant were done so in the data controller's legitimate interest.
21. The Respondent submits that the claim for compensation for the destroyed phone is baseless, as the possession and/or use of the device was in clear violation of paragraph 12 of the Friends School Keveye Girls' School Rules and Regulations. Granting an order for compensation, the Respondent argues, would undermine the purpose and enforcement of the school's rules, setting a detrimental precedent that could render schools ungovernable.
22. Furthermore, the Respondent contends that both the Complainant and the minor expressly consented to the school's rules and regulations by signing them on 20<sup>th</sup> April 2024, thereby acknowledging and accepting the consequences of any breaches.
23. As evidence, the Respondent adduced –
- i. A witness statement from the Sub County Director of Education, Sabatia Sub County, Vihiga County.
  - ii. A copy of the School Rules and Regulations duly signed by the minor and the Complainant as the Parent/Guardian.
  - iii. Copy of Gmail extract of an email sent to the Twitter Support Team.
  - iv. Copy of Response from the Twitter Support Team.
  - v. Copy of Gmail extract of an email sent to the Gmail Support Team.
  - vi. Copy of Screenshots of Facebook Messenger messages sent to various Facebook Accounts who had uploaded the video.

## **F. INVESTIGATIONS UNDERTAKEN**

24. The investigation process entailed a review of available documentation including the complaint form as lodged by the Complainant and the supporting evidence and the Respondent's Response and the supporting evidence, and investigations carried out on 5<sup>th</sup> December 2024 at the Respondent's premises. The investigation findings are as below.
25. A review of the video in question depicts a minor at school, under the supervision of teachers, destroying a mobile phone with a hammer while other students and staff members look on. This recorded act, involving minors in a public setting, underscores the sensitive nature of the content and necessitates strict adherence to data protection standards in its handling and dissemination.
26. The Respondent asserts that the recording and subsequent sharing of the video with the principal and the parent's association were carried out in accordance with the institution's internal policies and procedures. These were not availed during investigations.
27. The Respondent availed the School Rules and Regulations. Rule 12 states as follows in regards to contraband items/gadgets such as mobile phones –
- "A learner who flouts this rule, the gadgets shall be confiscated and destroyed in the presence of the learner. The learner shall then be sent home for at least seven (7) days for parental guidance. When coming back, the learner must be accompanied by a biological parent except for the total orphans to come with guardian to meet the school discipline committee."*

## **G. ISSUES FOR DETERMINATION**

28. In light of the above, This Office will not delve into the administrative actions taken by the Respondent to enforce its rules and regulations. Instead, it will focus exclusively on evaluating the processing of the minor's personal data in relation to her fundamental right to privacy.
29. As a preliminary issue, the Respondent stated that the minor could not be identified from the video. This Office reiterates that the minor is a data subject

as defined in Section 2 of the Act, as she is an identified and identifiable natural person who is the subject of personal data.

30. The following issues fall for determination by this Office:

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

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

31. In considering this question, the Office will interrogate the following two questions –

- a. Did the Respondent process the minor's personal data in accordance with the principles of data protection?
- b. Did the Respondent process the minor's personal data in accordance with Section 33 of the Act?

**Did the Respondent process the minor's personal data in accordance with the principles of data protection?**

32. Section 25(a) of the Act provides that every data controller or data processor shall ensure that personal data is processed in accordance with the right to privacy of the data subject. Pursuant to Section 25 (b), the personal data shall be collected lawfully, fairly and in a transparent manner in relation to any data subject.

33. Regulation 30(e) and (f) of the Data Protection (General) Regulations, 2021 ('the General Regulations') provides, the elements necessary to implement the principle of transparency include, providing a fair understanding of the expectation with regards to the processing particularly for children or other vulnerable groups, and providing details of the use and disclosure of the personal data of a data subject. [Emphasis]

34. The Respondent relied on Rule 12 of its rules to justify the recording of the minors, stating that the same was for legitimate administrative purposes and

intended solely for internal use. Specifically, it claims the video was created to collect real-time evidence and to store it for future reference.

35. The Respondent further states that the processing of the minor's personal data was to serve as a reference for future discussions with the minor's parent, to provide evidence if there are any disputes about the appropriateness of punishment and to deter future violation of school rules of a similar nature.

36. While this Office will not delve into the legitimacy of the administrative purpose of recording the video, the Respondent, as a data controller, was enjoined to ensure that the minor's guardian was provided with a clear understanding as to the expectation with regards to recording of the minor's personal data, particularly, the use and disclosure of the minor's personal data.

37. No evidence was provided to this Office to demonstrate that the Respondent had informed the minor's guardian that in enforcing the rule, a video recording of the minor would be taken and shared with various parties within the school and stored for future reference or for any of the purposes advanced by the Respondent.

38. Notably, Section 29 of the Act provides, 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.*

39. Regulation 23(2)(g) of the Data Protection (General) Regulations, 2021 provides, that a data controller or data processor shall develop, publish and regularly update a policy reflecting their personal data handling practices, including the collection of personal data from children, and the criteria to be applied.
40. The Respondent therefore processed the minor's personal data in a manner that offends the principle of transparency set out in Section 25 (a) & (b) as read with Section 29 of the Act and Regulation 23 of the General Regulations.
41. Further, Section 25 (d) of the Act provides that personal data collected should be adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed.
42. The elements necessary to implement the principle of data minimization are outlined in Regulation 33 of the General Regulations and include avoiding the processing of personal data altogether when this is possible for the relevant purpose and limiting the amount of personal data collected to what is necessary for that purpose.
43. According to the Respondent, the video recording of the minor was taken to collect real-time evidence and to store it for future reference. However, the Office notes that the video recording shared clearly identified the minor as well as other data subjects.
44. This Office finds that the purpose of collecting the real time evidence of enforcing school rules could have been achieved without processing the minor's and other data subject's images. The Respondent ought to have applied the available and suitable technologies for data avoidance and minimization, as required by Regulation 33(g) of the General Regulations, particularly noting that the personal data processed belonged to a minor.
45. It is therefore the finding of this Office that the Respondent processed the minor's personal data in a manner that offends the principle of data minimization set out in Section 25 (d) as read with Regulation 33 of the General Regulations.

**Did the Respondent process the minor's personal data in accordance with Section 33 of the Act?**

46. Section 33(1) of the Act provides, that every data controller or data processor shall not process personal data relating to a child unless consent is given by the child's parent or guardian **and** the processing is in such a manner that protects and advances the rights and best interests of the child. [Emphasis]

47. While it is not in doubt that the minor had been found with a mobile phone and was therefore flouting the Respondent School's Rules and Regulations, this Office finds that the manner in which the Respondent processed the minor's image in recording the video did not advance her rights and best interests. The Respondent could have achieved the purpose of the recording by either deidentifying the minor or ensuring they take the video in a manner that does not identify the minor or any other child.

48. Instructive is Section 41 of the Act which provides, that every data controller or data processor shall implement appropriate technical and organizational measures which are designed to implement the data protection principles in an effective manner; and to integrate necessary safeguards for that purpose into the processing. Furthermore, this duty applies both at the time of the determination of the means of processing the data and at the time of the processing.

49. The Respondent has failed to demonstrate to this Office that it complied with the relevant provisions of the Act. In light of the foregoing, the Office finds that the Respondent did not fulfill its obligations as a data controller and processor in relation to the processing of the minor's personal data.

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

50. 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.

51. The Complainant pleads that this Office order compensation for the unauthorized online exposure of the minor, which occurred without the necessary parental or

guardian consent. Additionally, the Complainant seeks compensation for the damaged phone, identified as a Techno Spark, valued at Ksh. 20,000. The Complainant also requests that appropriate action be taken against the individual responsible for recording the video, as the matter should have been resolved privately within the school administration.

52. In determining the remedies to issue, this Office is guided by the provisions of the Act and Regulations. Section 58 of the Act as read with Regulation 14(3)(a) of the Data Protection (Complaints Handling and Enforcement Procedures) Regulations, 2021, stipulates that remedies may include issuing an enforcement notice to the Respondent in accordance with the Act and these Regulations.

53. Given this Office's finding that the Respondent failed to fulfill its obligations as a data controller and processor in the processing of the minor's personal data, and having in mind the circumstances of the complaint, it is determined that the most appropriate remedy in this case is the issuance of an enforcement notice to the Respondent.

#### **H. FINAL DETERMINATION**

54. In consideration of all the facts of the complaints, the evidence tendered and the investigations conducted, the Data Commissioner makes the following determination:

- i. The Respondent is hereby found liable for failing to fulfil its obligations under the Act.
- ii. An Enforcement Notice is hereby issued to the Respondent.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

**DATED** at **NAIROBI** this 9<sup>th</sup> day of December 2024



**IMMACULATE KASSAIT, MBS**  
**DATA COMMISSIONER**