



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0628 OF 2025

FAITH KADEIZA AGOSA.....COMPLAINANT

-VERSUS-

WIGOT GARDENS HOTEL.....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 used her image for marketing and advertising without her knowledge or 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

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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 2nd May, 2025. 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 19th May, 2025 referenced **ODPC/CIE/CON/2/1 (313)**. 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 you 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 use of her photo for promotional purposes.

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- f) The mitigation measures adopted or being adopted to address the complaint to the satisfaction and to ensure that such occurrence does not take place again of the Complainant, if any;
- g) Any other information you wish the Office to consider.

8. This determination is therefore pursuant to the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021.

D. NATURE OF THE COMPLAINT

9. The Complainant, a former trainee undertaking her industrial attachment with the Respondent, asserts that the Respondent has unlawfully and without justifiable cause collected and processed her image for commercial purposes including marketing, advertising, and promotional activities to further its business interests. This ongoing use allegedly persisted for a period on 2 (two) years after completion of her industrial attachment.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

10. The Complainant states that during the period 26th October 2021 through to 1st January 2022 she undertook her industrial attachment with the Respondent.
11. She further alleges that during that period, the Respondent took photographs which it further used on its public platforms to advertise and market its hospitality training school.
12. The Complainant claims that at all material times she was neither informed that her personal data was being collected and for what purpose the same would be used. Additionally, she did not sign any consent or approval for any of her images to be collected or processed.
13. The Complainant further maintains that the Respondent's continued use of her images for commercial purposes and economic gain, without her consent or any

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remuneration, is unfair, unjust, and unlawful. She contends that this unauthorized exploitation of her likeness constitutes a violation of her rights.

14. As evidence, the Complainant furnished the Office with printed screenshots of the photographs as they appeared on the Respondent's social media platforms.

ii. THE RESPONDENT'S RESPONSE

15. The Respondent states that the Complainant, a student pursuing a Bachelor of Hotels and Hospitality Management degree, applied for industrial attachment with it, through the University as part of the academic requirements for completion of her studies.

16. The Respondent confirms that the request was granted, and the attachment period ran from October 2021 to February 2022.

17. The Respondent states that during the attachment period, Wigot School of Hospitality, a subsidiary of the Respondent, through its representative, Mr. P**| K****a, requested the Complainant and other students to participate in a photo and video session.

18. The Respondent alleges that it was clearly explained to all participants that the photographs and videos would be used for marketing and promotional purposes.

19. The Respondent alleges that the Complainant voluntarily consented to participate in the session and was the first to present herself and pose for the shoot, which took place at a location other than her regular workstation.

20. The Respondent states that following the session, W****m J**a, a staff of the Respondent and the individual who appears alongside the Complainant in the said photographs shared the photographs with the Complainant via WhatsApp for her to review and confirm which images she preferred to be used in the campaign.

21. The Respondent alleges that all participants in the session, including the Complainant, signed consent forms authorizing the use of their images for marketing purposes.

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These forms were administered by the Hospitality School's representative P**I K****a.

22. The Respondent acknowledges that the Complainant's signed consent form is presently unavailable, having been misplaced due to the lapse of time since the marketing campaign was undertaken.
23. The Respondent notes that, as admitted by the Complainant in her complaint, the photographs were uploaded during the course of her industrial attachment.
24. The Respondent states that until the filing of the complaint with the Office of the Data Protection Commissioner, the Complainant had not made any effort to approach the organization or revoke the use of her image.
25. The Respondent states that upon receiving notification from the Office of the Data Protection Commissioner, it made efforts to contact the Complainant with the intention to either summarily resolve the matter to her satisfaction, or pursue alternative dispute resolution (ADR) however, the Complainant did not respond to the email and phone calls made. Additionally, that the Complainant reported to the Office of the Data Protection Commissioner that the Respondent was disturbing her with the persistent follow-up phone calls.

F. INVESTIGATIONS UNDERTAKEN

26. The Office established that indeed the Respondent did not contest the allegation that it used the Complainant's image on to markets its services and products and to further its business continuity.
27. The Office established that the Respondent did not give evidence in support of a lawful basis for the processing of the Complainant's image for commercial purposes.
28. Furthermore, the Respondent did not demonstrate how it fulfils its duty to notify.

G. ISSUES FOR DETERMINATION

29. It is undisputed that the Respondent used the Complainant's image on its social media marketing platform.

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30. 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 obtained the Complainant's consent as required by the Act to use her image for commercial purposes;
- 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 OBTAINED THE COMPLAINANT'S CONSENT AS REQUIRED BY THE ACT TO USE HER IMAGE FOR COMMERCIAL PURPOSES.

31. 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.

32. The Act goes further to state the conditions of consent. It states as follows concerning 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)

33. Section 37 (1) of the Act provides for commercial use of data and states, "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 the data subject or is authorized to do so under any written law and the data subject has been informed of such use when collecting the data from the data subject."
34. Regulation 14 (1) of the Data Protection (General) Regulations 2021 further elaborates Section 37 of the Act as follows: -
- 14. Interpretation of commercial purposes*
- (1) for the purposes of section 37 (1) of the Act, a data controller or 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.*
35. It is undisputed that the Respondent used the Complainant's image in its social media marketing platform to advertise and market its services. As such, the Complainant's image was being used to advance the Respondent's commercial and economic interests. By the general public visiting the Respondent's public social media platform, one is induced whether directly or indirectly to buy, join and or subscribe to the Respondent's services. This constituted the use of the Complainant's image for commercial purposes which required express consent.
36. Furthermore, the burden of proof to establish a data subject's consent to the processing of personal data for a specified purpose rests with the data controller. The Respondent failed to furnish evidence of the Complainant's express consent to the use of her image for commercial purposes.
37. From the above, it therefore follows that the Respondent has not discharged its burden of proof to demonstrate that the Complainant expressly consented to the use

of her image for commercial purposes, as envisaged under Sections 2, 32 and 37 of the Act.

38. This Office therefore finds that as far as issue (i) is concerned, the Respondent did not obtain the requisite consent required by the Act to process the Complainant's image for commercial purposes.

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

39. Section 26 (c) & (d) of the Act gives the data subject the right to object to the processing of all or part of their personal data and the right to deletion of false or misleading data about them.

40. Section 40 of the Act provides for the right of rectification and erasure and states that a data subject may request a data controller or processor to erase or destroy without undue delay personal data that the data controller or data processor is no longer authorized to retain, irrelevant, excessive or obtained unlawfully.

41. Further to the above, Regulation 12 (3) of the General Regulations provides that a data controller or data processor shall respond to a request for erasure within fourteen days of the request. Regulation 8(3) of the General Regulations provides that a data controller or data processor shall, without charging any fee, comply with a request for objection under sub-regulation (2) within fourteen days of the request.

42. The Complainant did not furnish the Office with any evidence demonstrating that she sought to exercise her rights under the Act in any manner. Consequently, the Office is unable to establish a violation in this regard.

43. Based on the foregoing and with regard to issue (ii) herein, the Office finds that the Respondent did not violate the Complainant's rights.

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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. In consideration of the complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent processed the Complainant's image for commercial purposes without the requisite consent as stipulated 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. Having found that the Respondent has failed to prove that it obtained express consent from the Complainant to use her image on its public social media marketing platform the Respondent is hereby directed to compensate the Complainant the amount of **KES 250,000/= (Two Hundred and Fifty Thousand Kenya Shillings Only)**.
49. In so doing, this Office takes into account the nature and extent of violation with regard to unlawful processing of the Complainant's personal data and the period of violation. The Office in awarding compensation also took cognizance of the fact that the Complainant's images have since been pulled down by the Respondent in a bid to resolve the Complaint.

50. Furthermore, 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 did not fulfill its obligations as a data controller to the Complainant as a data subject as provided for under the Act, the Office hereby orders for an enforcement notice to be issued 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 is ordered to compensate the Complainant **KES 250,000/= (Two Hundred and Fifty Thousand Kenya Shillings Only)**.
- iii. An Enforcement Notice is hereby issued to the Respondent herein.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 31st day of July 2025



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**