



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0653 OF 2025

**JOYCE NDUNGWA MUEMA
(SUING ON BEHALF OF N.T.M
MINOR)**.....

COMPLAINANT

-VERSUS-

THINK TWICE KENYA.....

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 collected and used her daughter's image for marketing, branding, and advertising without her consent or any other lawful basis thereof.

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 COMPLAINT

6. This Office received a complaint from the Complainant on 7th 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 13th June 2025 referenced **ODPC/CIE/CON/2/1 (368)**. 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;

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- b) Provide any relevant materials or evidence in support of your response above;
 - c) A contact person who can provide further details as regards to this complaint;
 - d) Details on how you obtained the Complainant's personal data;
 - e) The contractual agreement with the complainant, if any;
 - f) Evidence as to whether the Complainant was notified and expressly consented to the use of her daughter's data for commercial purposes;
 - g) A detailed procedure on how data subjects can exercise their data protection rights;
 - h) Their data protection policy
 - i) 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 do not take place again
 - j) Any other information to be considered by 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, asserts that the Respondent has unlawfully and without justifiable cause collected and processed her daughter's image, a minor, for commercial purposes including marketing, advertising, and promotional activities to further its business interests since May 2024. The Complainant contends that this unauthorized and prolonged exploitation of her image constitutes a violation of her rights and an unjust enrichment to the Respondent

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

10. The Complainant states that it came to her attention that her daughter's images, the minor herein, were collected and further processed without her consent or any other lawful basis.

11. That these photographs have been used by the Respondent's across all its social media platforms for the past year.

12. As evidence, the Complainant furnished the Office with –

- i. Printed Screenshot of the photograph being used on the Respondent's various social media platforms.
- ii. Several links to the various social media platforms with the minor's images in display.

ii. THE RESPONDENT'S RESPONSE

13. The Respondent was served with the notification of the complaint via email on 13th June 2025 and the Office followed up with physical service on 18th June 2025.

14. The Respondent failed, refused and/or neglected to respond to the Notification of Complaint therefore the allegations made against it remain unchallenged.

F. INVESTIGATIONS UNDERTAKEN

15. Upon careful analysis of the evidence and applicable law, the Office found that indeed the minor's images were still actively in use on TikTok and Facebook platforms.

16. Despite effective and prompt service of the notification of complaint, the Respondent remained unresponsive at all material times.

G. ISSUES FOR DETERMINATION

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

18. 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 his image for commercial purposes;

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- ii. Whether the minor 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.

19. 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.
20. The definition of the Act details the minimum criteria of or for consent to be that it must be certain that the individual has consented, and what they have consented to. There must be a clear signal that they agree or have agreed to the processing. The unambiguity of the consent further links in with the requirement that consent must be verifiable to the extent that one must be able to demonstrate that the data subject consented to the processing.
21. From a combined reading of the above definitions, it is apparent that valid consent is a product of conscious decision-making and requires affirmative action. It should be demonstrable and capable of being proven.
22. Section 27(a) of the Act provides that a right conferred on a data subject may be exercised where the data subject is a minor, by a person who has parental authority or by a guardian.
23. Section 33 of the Act provides for processing of personal data relating to a child. It provides that every data controller or data processor shall not process personal data relating to a child unless:
 - a. Consent is given by the child's parent or guardian; and
 - b. The processing is in such a manner that protects and advances the rights and best interests of the child.

24. 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.

25. 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)

26. 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 authorised 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."

27. 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.

28. It is undisputed that the Respondent used the Complainant's minor's images on various public social media platforms to advertise, promote and market its events. As such, the minor's images were being used to advance the Respondent's commercial and economic interests. By the general public viewing the Respondent's 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 minor's images for commercial purposes which required express consent.

29. Further, consent can only be proven by the Respondent as the burden of proof establishing a data subject's consent to the processing of their personal data for a specified purpose rests upon the data controller. The Respondent herein failed, refused and/or neglected to furnish the Office with a response to the notification of complaint. As such the Respondent failed to demonstrate that indeed the Complainant expressly consented to the use of her child's images for marketing and advertising.

30. 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 his minor's image for commercial purposes, as envisaged under Section 32 (1), 33 and 37 of the Act.

31. This Office therefore finds that as far as issue no (i) is concerned, the Respondent did not obtain the requisite consent required by the Act to use the Complainant's image for commercial purposes.

II. WHETHER THE COMPLAINANT IS ENTITLED TO REMEDIES UNDER THE ACT.

32. 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.

33. Having considered the merits of the complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent processed

the Complainant's minor's images 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.

34. 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.
35. 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.
36. The Complainant sought various remedies including that the Respondent ceases all use of the minors' images on all its physical and E-platforms, that the Respondent permanently takes down all its images from all its public platforms and compensation for the violation of the minors' rights as per the Act.
37. Having found that the Respondent failed, refused and/or neglected to prove that it obtained express consent from the Complainant for the use the minor's images on its public social media platform, the Respondent is hereby directed to compensate the Complainant the amount of **Kshs. 700,000/= (Kenya Shillings Seven Hundred Thousand Only)** for the use of the minor's images for commercial purposes without express consent.
38. 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.

39. 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.

FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for the use of the minors' images for commercial purposes without express consent;
- ii. The Respondent to pay the Complainant a sum of **Kshs. 700,000/= (Kenya Shillings Seven Hundred Thousand Only)** as compensation; and;
- iii. An Enforcement Notice to hereby be issued against the Respondent.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 4th day of August 2025



IMMACULATE KASSAIT, MBS

DATA COMMISSIONER

KENYA

