



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0556 OF 2025

CHERRY FIONA MWENDWACOMPLAINANT

-VERSUS-

ACCELER GLOBAL LOGISTICS.....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 lodged a complaint with the Office on 11th April 2025. She avers that the Respondent used her partial image on its internal track and trace system from 2021 even after she issued a cease-and desist letter in November of 2021.

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 as '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 (hereinafter as '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 11th April 2025. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by the Complainant, who was an aggrieved data subject.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondents of the complaint filed against them *vide* a letter dated 28th April, 2025 and referenced ODPC/CIE/CON/2/1 (252). In the Notification of the Complaint, the Respondent was informed that if the allegations by the Complainant were true, they were in violation of various provisions of the Act. Further, 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 could provide further details as regards to this complaint;
 - c. Any relevant materials or evidence in support of their response above;
 - d. The lawful basis relied upon to process the Complainant's personal data for commercial venture;

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- e. An elaborate representation of how data subjects can exercise their rights in relation to data protection;
 - f. The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint does not take place again; and
 - g. Any other relevant information they wish the Office to consider.
8. On 19th May 2025, the Respondent submitted to the Office a Response to the Notification of Complaint.
9. Upon receipt of the aforementioned correspondences and documents, investigations were conducted as required by Regulation 13(1) of the Complaints Handling Procedures, 2021.
10. This determination is therefore as a result of analysis of the complaint as received and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

11. It is the Complainant's assertion that the Respondent used her partial image on its internal track and trace system from 2021 even after she issued a cease-and-desist letter in November of 2021.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

12. The Complainant avers that her image was used on the Respondent's internal Track and Trace system from 2021 without her consent.
13. That she had issued a cease-and-desist letter on 1st November 2021 instructing the Respondent to remove the image, but it remained in use.
14. That the image, though partial and translucent, was visible enough to be identified by third parties.
15. That the Respondent failed to act on her initial objections, demonstrating willful disregard for her privacy rights.
16. That the image was used to secure commercial advantage, including use in promotional materials and tenders.

17. That the image continued to appear even after the termination of her employment, without a lawful basis.

18. That the use of her image caused her emotional distress and exposed her to reputational harm.

19. The Complainant sought the following remedies from this Office:

- i) A finding that the Respondent unlawfully appropriated her data without consent;
- ii) A finding that the Respondent unlawfully derived commercial gain from the use of her images without consent;
- iii) A finding that the continued use of her images despite demand to cease aggravated the breach of her rights;
- iv) General damages for:
 - Unlawful use of her images without her consent in breach of the right to privacy;
 - Unlawful use of her images for commercial gain in breach of her proprietary rights;
 - Exemplary damages for the continued use of her images despite demand to cease.

ii. THE RESPONDENTS' RESPONSE

20. The Respondents submitted a response to the notification dated 19th May 2025 in which they averred as follows;

21. That the Complainant initially consented to the use of her image during her employment.

22. That it did not use the image for any commercial or promotional purposes.

23. That the image indeed remained on its internal Track and Trace platform but was translucent and unidentifiable.

24. That the image was never visible to the general public but only to internal users and existing customers.

25. That the prolonged display of the image was due to inadvertent oversight, not malice or willful neglect.
26. That the Complainant raised the issue again only after the termination of her employment.
27. That the Respondent removed the image immediately upon receiving the Advocate's letter in July 2024 and offered an apology.
28. That the image had no commercial value in its line of business.

F. ISSUES FOR DETERMINATION

29. In light of the above, the following issues fall for determination by this Office:

- i. Whether there was a violation of the Complainant's rights under the Act and attendant regulations.
- ii. Whether the Respondent lawfully processed the Complainant's personal data.
- iii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

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

28. Section 26(c) of the Act provides for the right to object to processing of personal data. Further Section 36 of the Act states that, "*a data subject has a right to object to the processing of their personal data, unless the data controller or data processor demonstrates compelling legitimate interest for the processing which overrides the data subject's interests, or for the establishment, exercise or defence of a legal claim.*"
29. Regulation 8 further specifies "*that a data Subject may request a data controller or processor not to process all or part of their personal data, for a specified purpose or in a specific manner.*"
30. It is worth noting that the right to object to processing is an absolute right where processing is for direct marketing purposes.

31. In this case, the Complainant exercised her right to object to the processing of her data, by writing a letter dated 1st November 2021 to her employer at the time, the Respondent.
32. The Respondent was obligated to honor the Complainant's request to cease processing her personal data. However, the Respondent disregarded this objection and continued to display her image on their Track and Trace platform. The Office takes cognizance of the fact that the Respondent only removed the Complainant's image upon receiving a letter from the Complainant's Advocate in July 2024.
33. Based on the above, this Office concludes that the continued display of the Complainant's image on their Track and Trace platform, despite the Complainant's clear objections, constitutes a direct violation of the Complainant's right to object under Section 26 (c) of the Act.

II. WHETHER THE RESPONDENT LAWFULLY PROCESSED THE COMPLAINANT'S PERSONAL DATA

34. Section 30 of the Act stipulates 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. In this particular case, the Respondent processed the Complainant's personal data despite a cease-and-desist letter by the Complainant.
35. The Act goes further to state the conditions of consent. It states as follows concerning the conditions of consent under Section 32: -

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)

The Respondent has not demonstrated they had consent to process the Complainant's personal data.

36. Section 37(1) of the Act which states 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."*

37. 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.

38. Both the Complainant and the Respondent assert that the displaying of the Complainant's image on its internal platform, was accessible internally to the staff and to existing customers. Further, the Respondent asserts that the same added no commercial value to the Respondent's business.

39. In this regard, and from evidence adduced, the Office finds that since the Complainant's partial image was available to internal staff and already existing customers and not the general public, the same does not pass the threshold of processing for commercial purposes under section 37.

40. The Complainant had also alleged that her image was used in tendering documents by the Respondent. However, in absence of proof of the same, the Office finds that the same also does not meet the threshold under Section 37 of the Act.

41. It is trite that the Respondent has the burden of proof establishing a data subject's consent to the processing of all or part their personal data and for a specified purpose. Therefore, the Respondent was required to obtain explicit consent from

the Complainant prior to using her personal data for purposes beyond those originally stated at the time of collection or in the alternative provide the lawful basis under Section 30

42. This Office therefore finds that as far as issue no (ii) is concerned, the Respondent failed to get the requisite consent to process the Complainant's personal data and therefore did not lawfully process the Complainant's personal data.

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

42. 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.

43. The Complainant requested this Office to issue an award of compensation. Section 65 of the Act provides 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. The Section indicates that damage included financial loss and damage not involving financial loss including distress.

44. Further, Regulation 14 (3) (e) of the Enforcement Regulations provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

45. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's right to object processing under Section 26(c) of the Act was infringed upon by the Respondent and unlawfully processing the Complainant's personal data.

46. In further considering whether to issue compensation, the Office also considers that the Respondent deleted that partial image from its internal system.

47. In this context, the Respondent is hereby ordered to pay the Complainant **Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000)** for the infringement of her rights under the Act.

G. FINAL DETERMINATION

48. The Data Commissioner therefore makes the following final determination: -

- i. The Respondent is hereby found liable.
- ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Two Hundred and Fifty Thousand (KES 250,000)** as compensation.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 9th day of July 2025.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**



