



**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 0838 OF 2025**

BRIAN ONYANGO.....1ST COMPLAINANT
CLEMENCE WANGIO.....2ND COMPLAINANT
-VERSUS-
VANESSA BWIBO T/A BWIBO RESTAURANT.....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 Office received a complaint on 10th June 2025 from the Complainants alleging that the Respondent, without their consent, obtained and published their images for promotional and commercial purposes on the Twitter (X) platform.

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 Complainants' legal representatives on 10th June 2025. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations, 2021, by Brian Onyango and Clemence Wangio as the aggrieved data subjects.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it. The notification of complaint to the Respondent was issued on 23rd June 2025 vide letter referenced ODPC/CIE/CON/2/1 (404).
8. In the notification of the complaint, the Respondent was among other things 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 to the complaint;
 - c) Provide any relevant materials or evidence in support of the response above;
 - d) The lawful basis relied upon to process the Complainant's personal data;
 - e) Evidence as to whether the Complainants consented to their personal data being used for promotional and commercial purposes;
 - f) Mitigation measures adopted or being adopted to address the dispute to the satisfaction of the Complainant, if any.

- g) Any other information that it may wish the Office to consider.
9. 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.
10. The Respondent responded to the said notification letter on 14th July 2025.
11. This determination is therefore pursuant to Regulation 11(2) of the Enforcement Regulations which provides that where a Respondent does not take any action as contemplated in law, the Data Commissioner shall proceed to determine the complaint in accordance with the Act and these Regulations.

D. NATURE OF THE COMPLAINT

12. The complaint concerns the Complainants' allegations that the Respondent used their images on its social media platforms without their knowledge or consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

13. The Complainants contended that on or about October 2024, they discovered that the Respondent had unlawfully obtained and used their images for promotional and commercial purposes by publication and dissemination of the images on their Twitter platform to advertise their Restaurant without their consent, knowledge or legal authorisation.
14. They stated that the unauthorized and unlawful collection and processing of data, and publishing of the same without consent from the complainants has amounted to emotional distress, unwanted public attention including inquiries from peers and strangers and a false allegation and speculation that the

complainants are "influencers" of the Respondent. Additionally, the complainants have suffered reputational harm arising from the misleading association with the respondent and unwanted public exposure.

15. That despite issuing two (2) demand letters dated October 15, 2024 and January 24, 2025 for amicable settlement and compensation for the violation of the complainants' rights, the Respondent has failed, declined or neglected the complainants demand for compensation for the use of their personal data for commercial and promotional purposes.

ii. THE RESPONDENT'S RESPONSE

16. In its response dated 30th June 2025, the Respondent stated as follows: -

17. Bwibo Restaurant posted general photographs on the outlook of the restaurant on its X handle in May 2022 with a simple message of three words; "welcome to Bwibo." A clear analysis of the post shows that the same was a cluster of four photos showing the cuisine and the general outlook of the restaurant.

18. The photo in which the complainants claim to specifically appear in them is a photo showing the restaurant seating area and was meant to capture the restaurant arrangement and outlook contrary to the complainant's allegations on reputational damage.

19. The post was neither maligning or defamatory in any way and neither did it target a specific person in the audience. A clear look at it shows other customers dining in the restaurant area as well.

20. At no point did the post mention the complainants' name and associate them with the restaurant to cause them emotional distress and reputational damage due to associating them with the restaurant as they claim.

21. Furthermore, Bwibo restaurant has a huge poster in form of a notice pinned on its wall. The aim of the notice is to inform members about their consent attached to this response is quite conspicuous hence was clearly seen by the complainants at the time when they were walking into the restaurant.

22. They stated that it is a tall order for the restaurant owner to seek consent from each individual before taking the random photographs of the restaurant since the same is not targeted on any customer and that's why the management deemed it fit to have a general poster on consent as regards to photography while at the premises.
23. Bwibo Restaurant was first served with a demand dated 15th October 2024 from the complainants' advocate whereby the same was demanding for the post to be pulled down with immediate effect and a written apology to be tendered. The Restaurant did comply with the demand whereby the management did pull down the post immediately as the first measure then proceeded to tender a written apology through its advocates *via* response to demand dated 16th October 2024.
24. In the response to demand, they indicated to the complainants through their advocates that the post did not yield any income to the restaurant since it was not commercialised in anyway. The same was a general post of the restaurant outlook. They also indicated that the option of compensation was not viable as since the post was not meant to be a commercial in nature.
25. The Respondent stated that it has been cooperative since the inception of this matter and willing to have it settled amicably, and that is why it immediately complied with the demand letters and pulled down the post and tendered an apology despite a notice on photography to the general public being in place.
26. That pursuant to Data protection Act 2019, data controllers must report data breaches to the Office of the Data Protection Commissioner (ODPC) within 72 hours of becoming aware of the breach, as per Section 43 of the Act. This notification requirement applies to both accidental and deliberate unauthorized access, loss, alteration, or disclosure of personal data.
27. That as to the complaint at hand, the posting was done on 29th May 2022, the action has been filed in 2025 which is 3 years since the breach, the complainants have not given justifiable reason for the 3 years delay. It is thus unfair, exploitative

and against the law for them to seat and wait to file a complaint against the Respondent three years down the line.

28. That the present complaint is an afterthought and monetarily motivated since there is no infringement of the right to privacy that is being committed. If the complainants are truly hurt as they claim, then the complaint would have been lodged in 2022 when the post was done.

29. They further stated that it is also unfair for the complainants to demand monetary compensation when the Respondent had complied with conditions in the demand and that the post was not used for commercial purposes and no income was generated from the post.

F. ISSUES FOR DETERMINATION

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

- i. Whether the Respondent obtained express consent from the Complainants to process their personal data for commercial purposes; and
- ii. Whether the Complainants are entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENT OBTAINED EXPRESS CONSENT FROM THE COMPLAINANTS TO PROCESS THEIR PERSONAL DATA FOR COMMERCIAL PURPOSES.

31. The Complainants stated that the Respondent used their images on their social media for promotional purposes without their consent. The Respondent, on its part, stated that the impugned photograph was neither maligning or defamatory in any way and neither did it target a specific person in the audience. To the Respondent, the photo was meant to capture the restaurant arrangement and outlook contrary to the complainants' allegations on reputational damage.

32. 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.

33. 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.

34. The Act goes further to state the conditions of consent. It states as follows with regard to 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)

35. Additionally, Regulation 4 of the Data Protection (General) Regulations, 2021 stipulates that the processing of personal data must be based on consent in accordance with Section 32 of the Act. When seeking consent prior to processing, the data controller or data processor must inform the data subject of the following:

- i. The purpose of each processing operation for which consent is sought;
- ii. The type of personal data that will be collected and used;
- iii. The right to withdraw consent; and
- iv. The implications of providing, withholding, or withdrawing consent.

36. Regulation 4(3) specifies that when obtaining consent from a data subject, the data controller or data processor must ensure that the data subject voluntarily gives consent and that the consent is specific to the purpose of processing.
37. From the above provisions of law, the burden of proof for consents lies on the Respondent. The Office observes that although the Respondent stated the circumstances within which the photograph was taken, it did not discharge its burden of proof. As such, the Respondent did not discharge its burden of proof as envisaged under Section 32 (1) of the Act.
38. On the issue of commercial use of personal data, the Act provides under Section 37 (1) (a) 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.
39. Regulation 14 (1) of the General Regulations provides the interpretation of 'commercial purposes' and provides that for the purposes of Section 37 (1) of the Act, a data controller or data 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.
40. A review of the impugned post featuring the image and likeness of the Complainant shows that the Respondent included the text 'Welcome to Bwibo'. This text is aimed at advancing the Respondent's commercial interests. It induces people to come and buy from the respondent.
41. This Office therefore finds that as far as issue no (i) is concerned, the Respondent did not obtain express consent from the Complainants to process their image for commercial purposes.

II. WHETHER THE COMPLAINANTS ARE ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS.

42. Under 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. As their reliefs, the Complainants sought compensation. The Respondent did not respond to these prayers of relief.

44. 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.

45. 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.

46. The Office takes cognisance of the fact that while the Respondent processed the Complainants' image without their consent, they took certain steps to address the complaint, including immediately pulling down the impugned posts from their platforms.

47. As such, this Office hereby directs the Respondent to compensate the Complainants a cumulative sum of **KES 50,000/- (Fifty Thousand Shillings only)** as follows:-

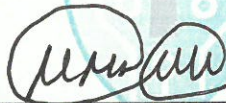
- a. 1st Complainant, Brian Onyango – KES 25,000/= (Twenty-Five Thousand Kenya Shillings)
- b. 2nd Complainant, Clemence Wangio – KES 25,000/= (Twenty-Five Thousand Kenya Shillings)

G. FINAL DETERMINATION

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

- ii. The Respondent is hereby found liable.
- iii. The Respondent is ordered to compensate the Complainants **KES 50 000/= (Fifty Thousand Kenya Shillings Only)** as follows:
 - a. 1st Complainant, Brian Onyango – **KES 25,000/= (Twenty-Five Thousand Kenya Shillings)**
 - b. 2nd Complainant, Clemence Wangio – **KES 25,000/= (Twenty-Five Thousand Kenya Shillings)**
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 7th day of September 2025.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**