



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 0740 OF 2025**

**MIRIAM OKWARA MOMBO.....COMPLAINANT**

**-VERSUS-**

**CARLCARE SERVICES LIMITED.....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 23<sup>rd</sup> May 2025 alleging that the Respondent used her image on its social media platforms 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 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 23<sup>rd</sup> May 2025. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainants on behalf of the aggrieved data subject.
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 19<sup>th</sup> June 2025 vide letter referenced **ODPC/CIE/CON/2/1 (380)**.
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 contractual agreement with the Complainant;
  - e) Whether the Complainant was notified and expressly consented to the continued use of her image for commercial purposes;
  - f) The lawful basis relied upon to deny the complainant her right to deletion;
  - g) Mitigation measures adopted or being adopted to address the dispute to the satisfaction of the Complainant, if any.
  - h) 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 17<sup>th</sup> June 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 Complainant concerns the Complainant's allegations that the Respondent used her image on its social media platforms without her knowledge or consent.

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

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

13. The Complainants stated that she had been employed by Carle Care Limited from January 2018 until November 2023, when her services were terminated, and during this period, she had worked diligently for the company. She emphasized that at no time during her employment had she ever consented, either expressly or otherwise, to the use of her photographs by Carle Care Limited for any commercial or any other purpose.
14. In November 2024, a family member had informed her that her image appeared on the official Facebook page of Carle Care Limited. According to her, the photo had been used to invite over 2 million followers of the page to visit the Nakuru branch for phone repairs.

15. She was shocked by this development because she had never given consent for the use of her image, she was not aware when the photo had been taken, and the post appeared more than a year after she had left the company.
16. The Complainant further explained that upon reviewing the Facebook page again, she had discovered that her image had also been used on 18th July 2024 as a pin location to direct members of the public to the Eldoret office for services. She reiterated that she had never consented to this use of her image, either and raised concern that her personal data was used long after her employment had ended.
17. She instructed her legal representatives to issue a demand letter to CarlCare Limited seeking an admission of liability and compensation. However, despite the demand notice being received and stamped, CarlCare Limited had taken no step to either remedy or mitigate the violation.
18. The Complainant avers that four months post the demand notice, the infringing images remained posted on CarlCare Limited's Facebook page. She referred to two specific links, dated 8th November 2024 and 18th July 2024, which contained the said photos and invited the Honourable Data Commissioner to verify her claims by visiting the links, which remained active as of 23rd May 2025.
19. The Complainant observes that the said posts had attracted engagement from the public, thereby drawing business or potential business prospects to CarlCare Limited. She added that the infringing photographs included an image of her seated at a reception counter and another image of her used as a pin location.
20. To support her complaint, the complainant attached:-
- a) Screenshots of the Complainant's image on the Respondent's Social Media Pages.
  - b) A copy of the demand letter.

Handwritten signature or initials.

## ii. THE RESPONDENT'S RESPONSE

21. In its response dated 17<sup>th</sup> June 2025, The Respondent stated as follows: -

22. The Respondent avers that the Complainant consented to the use of her image while still working for the Respondent.

23. Furthermore, the Respondent contends that the consent was unfortunately not in writing but was verbal and that the image of the Complainant was used based on the said verbal consent.

24. That the Complainant's image was brought down immediately she registered a complaint regarding its use and that the Respondent has not used the Complainant's image thereafter.

## F. ISSUES FOR DETERMINATION

25. 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 COMPLAINANT TO PROCESS HER PERSONAL DATA FOR COMMERCIAL PURPOSES.

26. The Complainant stated that the Respondent used her image on their social media for promotional purposes without her consent. The Respondent on its part stated that they used the Complainant's image based on her verbal consent.

27. The Black's Law Dictionary, 10<sup>th</sup> Edition, defines consent as "agreement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person.

28. 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.

29. 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. This certainty requires more than just a confirmation that they have read and understood the terms and conditions. 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.

30. 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.

31. 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)*

29. 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.

32. 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.

33. From the above provisions of law, the burden of proof for consents lies on the Respondent. This Office observes that although the Respondent claims that verbal consent was given, it has not provided sufficient evidence to substantiate this claim or to meet the burden of proof required to validate such a statement. As such the Respondent did not discharge its burden of proof as envisaged under Section 32 (1) of the Act.

34. 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.

35. 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.

36. A review of the advertisements featuring the image and likeness of the Complainant shows that the Respondent included text associated with the Complainant's image or likenesses.

37. This Office therefore finds that as far as issue no (i) is concerned, the Respondent did not obtain express consent from the Complainant to process her image for commercial purposes.

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

38. 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.

39. As their relief, the Complainant sought that she be compensated and that the impugned image containing her personal data be erased, deleted and or pulled down by the Respondent from its platforms permanently. The Respondent did not respond to these prayers of relief.

40. 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.

41. 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.

42. Having found that the Respondent did not obtain express consent from the Complainant before using her image for commercial purposes, the Respondent is hereby directed to compensate the Complainant **KES 500,000/- (Five Hundred Thousand Shillings Only)**.

**G. FINAL DETERMINATION**

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

- i. The Respondent is hereby found liable.
- ii. The Respondent is ordered to compensate the Complainants **KES 500 000/= (Five Hundred Thousand Kenya Shillings Only)**.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 21<sup>st</sup> day of August 2025.



