



## OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0681 OF 2025

JOHN MKOMBA NZAU.....COMPLAINANT

-VERSUS-

KUZA SACCO SOCIETY 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 Complainant lodged a complaint with the office averring that the Respondent has been sending him unsolicited message without his 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 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 13<sup>th</sup> May 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 19<sup>th</sup> May, 2025 and referenced ODPC/CIE/CON/2/1(314). 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 can provide further details as regards to this complaint;
  - c. Provide any relevant materials or evidence in support of your response above;
  - d. The lawful basis relied upon to process and engage with the complainant's personal data;
  - e. Evidence as to whether the Complainant consented to use of his personal data for marketing purposes.

- f. An elaborate representation of how data subjects can exercise their rights in relation to data protection.
  - g. The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the Complaint,
  - h. The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the Complaint do not take place again, if any,
  - i. Any other relevant information the Respondent wishes the Office to consider.
8. The Respondent submitted to the Office a Response to the Notification of Complaint.
  9. Upon receipt of the aforementioned correspondence 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 he has been receiving unsolicited messages from the Respondent without his consent nor being a member of the Respondent.

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

##### **i. THE COMPLAINANT'S CASE**

12. The Complainant states that the Respondent has been sending unsolicited messages to his personal number 07#####, and avers that the Respondent has harassed him with numerous marketing messages which caused him considerable distress and emotional torture.
13. He further avers that he is aggrieved by the Respondent's actions since he has never been their customer, nor does he have a loan facility with the Respondent, nor has he ever given express consent for such communications.

14. The Complainant notes that even after he stopped the Respondent from sending unsolicited marketing messages on 23<sup>rd</sup> April 2025, the Respondent nevertheless continued to send such messages on 2<sup>nd</sup> May 2025 and 5<sup>th</sup> May 2025.

15. The Complainant further states that on 6<sup>th</sup> May 2025, he wrote an email to the Respondent seeking damages and the deletion of his personal data, yet avers that the Respondent ignored his request, and supports his claim by asserting that the Respondent's conduct was deliberate, persistent, and in blatant disregard of his express objection and rights under the law.

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

- i. Order for compensation of 1,500,000 following the emotional distress, psychological torture, harassment, disturbances, inconveniences, exposure to financial fraud and identity theft caused by the respondent's action.

17. The Complainant provided screenshots of the unsolicited messages as sent to the Respondent to support their complaint.

## **ii. THE RESPONDENTS' RESPONSE**

18. The Respondent avers that the allegations made by the Complainant to the effect that he was harassed through numerous unsolicited marketing messages causing distress and emotional torture are not true, but merely a bare allegation.

19. The Respondent submitted Complainant may have opted out and subsequently opted back in to receive promotional messages to fraudulently take advantage of the Respondent by purporting to claim a data breach and demanding compensation without just cause.

20. The Respondent further notes that Safaricom PLC should be enjoined in the conduct of investigations in order to provide clarity and proof as to whether the Complainant indeed opted out or opted back in, since it is highly probable that the Complainant manipulated the opt-in and opt-out functions in a scheme to illegally reap monetary benefits from the Respondent.

21. The Respondent supports this contention by pointing to the screenshot message dated 23<sup>rd</sup> April 2025, attached by the Complainant as evidence of opting out,

which expressly states: *"YOU HAVE SUCCESSFULLY STOPPED KUZA SACCO PROMOTIONAL MESSAGES. TO REACTIVATE DIAL 456\*9\*5#* The Respondent therefore avers that it is only evident that the Complainant reactivated the promotional messages and subsequently received them on 2<sup>nd</sup> May 2025 and 5th May 2025, and thus purports to base his claim for damages on an intentional act of his own making.

22. The Respondent further avers that once the Complainant opted out and notified the Respondent directly, erasure of his details from the promotional list was immediately undertaken, and no further promotional message was sent thereafter. Accordingly, the Respondent notes that if indeed the Complainant continued receiving messages, then liability cannot be attributed to the Respondent, and the matter ought to be addressed with Safaricom PLC, since the same might stem from their end.
23. The Respondent contends that the telephone number relied upon by the Complainant does not constitute sensitive personal data within the meaning of Section 2 of the Data Protection Act, 2019, and avers that telephone numbers are readily accessible in the public domain. The Respondent further notes that all promotional messages contained an option to opt in, opt out, or stop, thereby ensuring that consent to receive marketing messages was always within the control of the Complainant.
24. The Respondent additionally states that it has a data protection policy, including a marketing data protection policy, through which data subjects may exercise their rights under the Data Protection Act.
25. The Respondent further contends that mitigation measures are in place and will continue to be adopted to address complaints and prevent recurrence, including the availability of a data protection policy whenever services are marketed. However, the Respondent avers that in this instance, no breach of data protection occurred, since the Complainant himself reactivated the opt-in option.
26. Finally, the Respondent avers that the only data held concerning the Complainant is his telephone number, which does not amount to sensitive data under the Act, and notes that the Complainant acted mischievously by opting out and opting back

in solely to purport a breach and thereby attempt to illegally mint money from the Respondent under the guise of a data protection violation.

### **iii. THE COMPLAINANT'S REJOINDER**

27. The Complainant contends that the Respondent's response should be rendered nugatory and otiose since it is entirely based on speculation without any tangible proof.
28. The Complainant further avers that the Respondent, vide the attached voice note, admitted liability for its unlawful actions by purporting to offer KES 10,000 as remedies, citing that their scope of violation does not extend to hundreds of thousands.
29. The Complainant therefore states that the Respondent's admission, coupled with its speculative defence, should be dismissed, and this Office invited to award KES 1,500,000 as prayed, on account of the distress and emotional torture suffered.
30. The Complainant notes that he exercised his right of objection to processing under Section 36, as well as his right of erasure under Section 40 of the Data Protection Act, as evidenced by the screenshot of opting-out and unsubscribing dated 23rd April 2025. The Complainant further avers that in exercising these rights, he acted in good faith and without ill-intention, and that by unsubscribing and opting out, he was simply avoiding annoyance, disturbances, and distress while protecting his right to privacy as guaranteed under Article 31 of the Constitution of Kenya
31. The Complainant contends that under Section 32 of the Act, the Respondent, as a data controller, bears the burden of proof to establish that a data subject has consented to the processing of their personal data. The Complainant therefore avers that the Respondent's speculation that he "might have" opted out and opted back in is unsubstantiated and that the Respondent bears the burden of proving such a claim. He further states that a data controller is accountable to ensure that promotional messages cease once a data subject opts out, and by continuing to send such messages on 2nd May 2025 and 5th May 2025, the Respondent is fully liable for its unlawful actions.
32. The Complainant further avers that the Respondent did not obtain prior consent to process his personal data for commercial purposes as required under Section

37(1)(a) of the Act. He notes that the Respondent has failed to provide any evidence that it was authorized under any written law to process his data for commercial purposes or that he was informed of such use when his data was collected, contrary to Section 37(1)(b).

33. The Complainant additionally contends that Section 28 prescribes the lawful methods of data collection, while Section 29 imposes a duty to notify the data subject of such collection. He avers that the Respondent's claim that his personal data is in the public domain is speculative and unsupported, and notes that no evidence has been adduced to show that the Respondent notified him of the collection of his data.

34. The Complainant therefore states that the Respondent's response is without basis, founded purely on speculation, and ought to be dismissed in its entirety. He further avers that misuse of personal data including unauthorized access, collection, or processing undermines an individual's autonomy and control over their personal information, which is closely tied to their dignity and sense of self. He contends that the right to privacy is a fundamental human right, enshrined in international human rights law, and that the Respondent's violation of his data rights equally constitutes a violation of his inherent human rights.

35. Consequently, The Complainant avers that the Respondent maliciously breached his personal data, thereby causing him distress and emotional torture, while exposing him to financial fraudsters, identity theft, and phishing risks.

36. In view of the foregoing, the Complainant respectfully invites this Office to dismiss the Respondent's speculative defence and to award him KES 1,500,000 as remedies for the distress, emotional torture, exposure to financial fraudsters, identity theft, and the potential risk of phishing

#### **F. ISSUES FOR DETERMINATION**

37. 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 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**

38. Further, under Section 26(c), a data subject has the right *to object to the processing of all or part of their personal data*. The Complainant has produced evidence of an opt-out message dated 23<sup>rd</sup> April 2025, which signified an exercise of this right. Nevertheless, the Respondent continued to process his data by sending promotional messages thereafter. The Respondent purports that the Complainant might have opted back in, yet, under Section 32, the burden of proof lies with the data controller to demonstrate consent.
39. Significantly, during the site visit to the Respondent's offices, it was established that the Respondent did not have any proof to show that the Complainant's consent was *freely given, informed, specific and unequivocal*. This omission reinforces the finding that the processing lacked a lawful basis.
40. Accordingly, this Office finds that the Respondent violated the Complainant's rights under Section 26(c) of the Data Protection Act.

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

51. 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.
52. 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.
53. 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.

54. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's right to object processing under Section (c) of the Act was infringed upon.

55. In this context, the Respondent is hereby ordered to pay the Complainant **Kenya Shillings Fifty Thousand (KES 50,000)** for the infringement of his rights under the Act.

#### **G. FINAL DETERMINATION**

56. 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 Fifty (KES 50,000)** 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 11<sup>th</sup> day of August 2025.



**IMMACULATE KASSAIT, MBS**  
**DATA COMMISSIONER**

**KENYA**

