



OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 0958 OF 2025

SAMUEL MURIMI NYAGA.....COMPLAINANT

-VERSUS-

INCREDO FINANCE.....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 1st July 2025 from the Complainant alleging that the Respondent, without his consent, obtained and published his image for marketing and commercial purposes on the Respondent's official Instagram 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 Complainant on 1st July 2025. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations, 2021.
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 16th July 2025 *vide* letter referenced ODPC/CIE/CON/2/1 (469).
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) 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 21st July 2025.

D. NATURE OF THE COMPLAINT

11. The complaint concerns the Complainants' allegations that the Respondent used his image on its social media platforms without his knowledge or consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

12. The Complainant contended that on or about April 2025, he discovered that the Respondent had unlawfully obtained and used his image for promotional and commercial purposes by publication and dissemination of the images on its Instagram platform to advertise their products and services without his consent, knowledge or legal authorisation.
13. He stated that the Respondent published his image/ photograph on 1st December 2023 and on 9th December 2023, respectively, on its Instagram account for marketing and commercial purposes without his consent and knowledge.
14. The Complainant stated that he did not share his image/ photograph with the Respondent, and the said photograph was taken sometime in October 2022.

ii. THE RESPONDENT'S RESPONSE

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

16. Apart from mere allegation, no evidence has been shown that indeed the image is that of the Complainant and not that of a "look a like".
17. That the image in question is free to use content available on the internet at www.pexels.com
18. That Wikipedia defines "Pexels" as the provider of stock photography and stock footage in Germany, which maintains a library with over 3.2 million stock photos and videos. Stock photos are images created by photographers that are made available for use by others.
19. That, on the aforesaid website, the image is clearly labelled "**free to use**".
20. That, on further navigation of the website, specifically to <https://www.pexels.com/hc/en-us/articles/360042295174What-is-the-license-of-the-photos-and-videos-on-Pexels>, there is an elaborate explanation that photographs uploaded to the Pexels website are uploaded on the terms of a general license. The precise wording appearing on the website is that:
"all photos and videos uploaded on Pexels are licensed under the Pexels license. This means that you can use them for free for personal and commercial purposes without attribution"
21. That, considering the said image is available in the public domain and labeled free for use, and the same has a matter of fact being used by multiple entities in Kenya and abroad, the Respondent denies any liability to the complainant. The Respondent asserts that the image is data that is "**manifestly made public by the data subject**" for purposes of Section 45(b) of the Data Protection Act (Cap 411C).

F. ISSUES FOR DETERMINATION

22. In light of the above, the following issues fall for determination by this Office:
- i. Whether the Respondent obtained express consent from the Complainant to process his personal data for commercial purposes; and

- ii. Whether the Complainant is 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.

23. The Complainant stated that the Respondent used his images on their social media for promotional purposes without his consent. The Respondent, on its part, stated in as much as it used the photograph, it obtained the said photograph from a free-to-use site. It went ahead and added several links to the said site. The Respondent did not adduce any further evidence. In our investigations, the site was not accessible.

24. 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.

25. 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.

26. 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)

27. 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.

28. 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.

29. From the above provisions of law, the burden of proof for consents lies on the Respondent. The Office observes that the Respondent did not discharge its burden of proof as envisaged under Section 32 (1) of the Act.

30. 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.

31. 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.

32. A review of the impugned post featuring the image and likeness of the Complainant shows that the Respondent included the text: ***"Incredofinance After conquering a tough week, it's finally time to savour the weekend! Some have received that katext 'Confirmed. You have received..... and so it will be extra special. If you require that extra boost, your trusted financial partner is here to support you"*** This text is aimed at advancing the Respondent's commercial interests. It induces people to come and buy from the respondent.

33. 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 their image for commercial purposes.

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

34. 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.

35. As his relief, the Complainant sought compensation. The Respondent did not respond to these prayers.

36. 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.

37. 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.

38. As such, this Office hereby directs the Respondent to compensate the Complainant **KES 500,000/- (Five Hundred Thousand Shillings only)**.

G. FINAL DETERMINATION

44. 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 Complainant **KES 500000/= (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 22nd day of September 2025.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

KENYA