



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0590 OF 2025

DENNIS MBOGORO MUTHONI.....COMPLAINANT

-VERSUS-

AFRICA INTERNATIONAL UNIVERSITYRESPONDENT

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 submitted a complaint to the Office, alleging that the Respondent used his photo on the university's pamphlet for marketing purpose 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 19th 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 6th May 2025 and referenced ODPC/CIE/CON/2/1 (255). In the Notification of the Complaint, the Respondents were informed that if the allegations by the Complainant were true, they were in violation of various provisions of the Act. Further, the Respondents were asked to provide this Office with the following:
 - a. A response to the allegations made against you by the Complainant;
 - b. A contact person who can provide further details as regards this complaint
 - c. Any relevant materials or evidence in support for your response above,
 - d. The lawful basis relied upon to process the Complainant's personal data.
 - e. Evidence as to whether the Complainant consented to the use of his photo for marketing purposes.
 - f. The mitigation measures adopted or being adopted to address the Complaint to the satisfaction of the Complainant, if any

- g. The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint does not take place again; and
 - h. Any other relevant information they wish the Office to consider.
8. The Respondent submitted a response to the allegation vide a letter dated 6th May 2025.
9. 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

10. The nature of this complaint is the unauthorized use of the Complainant's image on university pamphlet without his express consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant, avers that he is an alumnus of Africa International University, having graduated in July 2023.
12. The Complainant alleges that during a recent visit to the campus, he was dismayed to discover that a photograph of him had been used in the university's official introduction pamphlet without his knowledge or consent. He notes that this pamphlet outlines the institution's academic programs and includes a data collection form for prospective students. It is, according to him, actively distributed to visitors and prominently displayed on the university's notice boards.
13. The Complainant contends that the continued public display and circulation of this pamphlet has caused him considerable personal and emotional distress. He states that the photograph in question was taken during a private photoshoot conducted by an independent consultant, whom he personally engaged and compensated. The shoot, he emphasizes, was not commissioned by nor affiliated with the university.
14. Additionally, he avers that the said photoshoot also featured his then-girlfriend, with whom he is no longer in a relationship. Her image appears on the front

page of the pamphlet, which, he argues, further compounds the emotional impact and discomfort resulting from the unauthorized use of their images.

15. At no point, he states, did the institution seek or obtain his consent to use his image for any marketing, promotional, or official purposes. The Complainant is aware that the university purports to rely on a clause in its student handbook, which reads: "*The University may with discretion seek consent from students whenever possible to use their name, voice, image or likeness in photos, communication, social media including marketing, advertising for official purposes, etc. However, by registering as a student at AIU, you consent to your name, voice or likeness being used without your permission or compensation and you release AIU from any liability of any nature.*"
16. However, the Complainant contends that, to the best of his recollection, he neither received nor signed the said student handbook.
17. In light of the above, the Complainant notes that he made a formal request to the institution to provide a signed copy of the handbook or any documentation evidencing his agreement to the clause. To date, no such documentation has been provided, nor has the university addressed the issue through its legal office.
18. Following his discovery of the pamphlet, the Complainant states that he made an immediate request for the material to be withdrawn from circulation and removed from all public display areas within the institution. However, the university has not complied with this request.

ii. THE RESPONDENTS' RESPONSE

19. The Respondent, Africa International University (hereinafter "the University"), states that it is a private, non-profit institution duly chartered by the Government of Kenya in 2011 and avers that it takes matters of data protection seriously, affirming compliance with the Kenyan Constitution and the Data Protection Act, 2019. The University further contends that it is registered as both a data controller and a processor and remains committed to observing all applicable data protection obligations.

20. Regarding the Complainant, the Respondent confirms that Complainant was indeed a student, having pursued both Diploma and Bachelor's studies in Information Technology between 2017 and 2023. The Respondent notes that he benefited from its work-study programme, and during this period, he was at times attached to the Marketing Department. It is during this attachment, the Respondent avers, that he interacted with Mr. A.F, the Respondent official photographer and content creator.
21. The Respondent contends that students are issued with a Student Handbook during the admission process and are required to sign an Admission Acceptance Form acknowledging, inter alia, their understanding and agreement to the provisions therein. The Complainant is said to have signed this form in 2017 upon enrollment for the Diploma course and again in 2023 upon graduation, affirming acknowledgement of the revised Handbook issued in 2020.
22. The Respondent purports that the said revised Handbook received by the Complainant via institutional communication channels contains *Clause 8.8, which provides that by registering as a student, one consents to the use of their image, name, or likeness by the University for official purposes, without further permission or compensation.*
23. Further, the Respondent avers that the Complainant consented to the use of his image not only through the signed acceptance forms but also through his conduct and communication. In particular, it is alleged that he participated in a photoshoot within university premises in full graduation attire, arranged by the University's photographer with assistance from a fellow photographer, Mr. G. A , who the Complainant refers to as a "private consultant." The Respondent states that this arrangement was informal and based on personal rapport, with the Complainant voluntarily sending a token of appreciation to both photographers.
24. The Respondent further alleges that the Complainant himself provided the link to the graduation photographs to the University's official, stating: *"Now AIU has good photos to post"*, which they interpret as a clear, affirmative act of consent. Additionally, in a later WhatsApp message, the Complainant criticized existing brochures, saying they featured outdated imagery and lacked youthful

representation, prompting the University's decision to update its materials — including with his image.

25. On the issue of consent withdrawal, the Respondent notes that the Complainant approached its Marketing Officer to raise concerns over the image usage. It is contended that the Officer explained the Handbook provisions and sought clarification on whether the Complainant wished to withdraw consent. Although the response was reportedly vague, the University agreed to withdraw the brochures and desist from further usage out of goodwill.
26. The Respondent states that the Complainant was referred to the Legal Officer, to whom he sent an email formally withdrawing consent. However, due to an email filtering error, the communication was directed to the junk folder and went unnoticed until the receipt of the present complaint.
27. The Respondent avers that, upon realizing the oversight, the Respondent promptly acted to withdraw all brochures featuring the Complainant's image and ceased any further use. This is said to be evidenced by production records and samples of new brochures.
28. The Respondent argues that it did not disregard the Complainant's wishes and has since responded to the belatedly-discovered email. It therefore contends that it is inaccurate for the Complainant to claim that his consent withdrawal was ignored.
29. In conclusion, the Respondent asserts that it obtained valid consent to use the Complainant's images, both through signed documents and voluntary digital communications. It alleges that the images in question were not from a private photoshoot but rather a friendly arrangement with the University's officer, using institutional facilities during an official graduation event.
30. The Respondent further contends that the Complainant's denial of receipt of the Student Handbook is unfounded and that its provisions indeed bound him. Consequently, the Respondent argues that no breach occurred to warrant compensation and that the claims made are, in its view, baseless and unjustified, particularly given its non-profit status.
31. As part of its mitigation efforts, the Respondent notes that it has since deleted the Complainant's images from its platforms and adopted enhanced consent

mechanisms to avoid similar occurrences. It also states that a Data Protection Officer has been appointed to oversee compliance matters going forward.

32. Lastly, the Respondent alleges that the Complainant and the lady featured in the brochure are, contrary to his assertions, still in a relationship and even engaged as evidenced by recent social media posts. This, they claim, undermines the credibility of his claim that the use of the image has caused emotional distress.

F. ISSUES FOR DETERMINATION

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

- i. Whether the Respondent used the Complainant's image for commercial purposes.
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENT USED THE COMPLAINANT'S IMAGE FOR COMMERCIAL PURPOSES

34. Section 2 of the Data Protection Act, 2019 defines "consent" to mean "*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 relating to the data subject.*"

35. Section 32 of the Act further provides for conditions of consent whereby the 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. Consequently, the burden is on the Respondent to prove that they had consent from the Complainant to use his image on their pamphlets.

36. Moreover, the Respondent has not provided sufficient documentary evidence such as a signed consent form or formal communication outlining the purpose of data processing to prove that the Complainant's consent was obtained in line with the law.

37. Furthermore, the Respondent claims to have relied on a clause in its Student Handbook which states that by registering as a student, one consents to the use of their image, name, or likeness for official university purposes. However, the Complainant has stated that he neither received nor signed any copy of the said handbook. On the other hand, the University has not provided evidence of where the Complainant's handbook. In the absence of such documentation, the reliance on this clause does not satisfy the standard of express or unequivocal consent as required by 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. While the Respondent is a public university, the use of the Complainant's image in a public-facing promotional pamphlet meant to highlight campus life and attract new students falls within the ambit of commercial use as contemplated under the Act. The promotional nature of the material clearly aligns with activities that advance institutional visibility and reputation which constitute commercial or public relations functions.
41. Under Regulation 14(2)(a), commercial use of personal data includes direct marketing through the sending of a catalogue via any medium. Where a university brochure or similar material containing the complainant's image is disseminated, this qualifies as direct marketing within the meaning of the regulation. The inclusion of a recognizable image in such material contributes

to the promotion of the institution and supports the conclusion that the personal data was used to advance a commercial interest.

42. Regulation 14(3) clarifies that marketing is not considered direct if personal data is not used to identify or target specific recipients. However, since the complainant's image was clearly identifiable and used in a way that targets a defined audience namely, prospective students and the general public, this exclusion does not apply in the present circumstances.

43. From the foregoing, the Office therefore finds that as far as issue no (i) is concerned, the Respondent did not obtain express consent from the Complainant to process the Complainant's personal data for the commercial purposes.

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

44. 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.

45. The Complainant seeks compensation for the unauthorized commercial use of his image in the university's marketing materials over the past year.

46. With regards to the award of compensation, Section 65 of the Act provides for compensation to data subjects and states, "*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.*"

47. Section 65(4) of the Act states that, "*damage includes financial loss and damage not involving financial loss, including distress.*"

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

49. Notably, in assessing the appropriate remedy, the Office has also taken into account the remedial measures undertaken by the Respondent following the lodging of this complaint. These include the withdrawal and discontinuation of all promotional pamphlets containing the Complainant's image, conducting

internal sensitization and training of staff on data protection obligations, and instituting enhanced consent mechanisms for future processing activities. While these actions do not cure the initial breach, they reflect a degree of responsiveness and commitment to improved compliance.

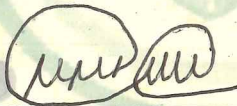
50. The Office hereby orders the Respondent to pay the Complainant **Kenya Shillings Two Hundred and Fifty Thousand (KES. 250,000/=)** as compensation for use of his image for commercial purposes.

G. FINAL DETERMINATION

51. The Data Commissioner therefore makes the following final determination:

- i. The Respondent is hereby found liable.
- ii. The Respondent is hereby **ordered to pay the Complainant 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 17th day of July 2025.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**