



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0688 OF 2025

WINNIE NYAKERARIO CHARLESCOMPLAINANT

-VERSUS-

CHINA SQUARE KENYA

KISUMU BRANCH.....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 complaint concerns the allegation that the Respondent used the Complainant's image on a public banner and social media platform for commercial gain without her express consent or any other lawful basis thereof.

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 13th May 2025. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainant who was the aggrieved data subject.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 13th June, 2025 referenced **ODPC/CIE/CON/2/1 (371)**. 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 sections of the Act. Further, among other things, the Respondent was asked to provide this Office with the following:
 - a) A response to the allegations made against you by the Complainant and, a contact person who can provide further details as regards this complaint;

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- b) Provide any relevant materials or evidence in support of your response above;
- c) The contractual agreement with the complainant, if any;
- d) Whether the Complainant was notified and expressly consented to the use of her image for commercial purposes;
- e) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
- f) Any other information you wish the Office to consider.

8. The Respondent responded to the allegations made against it vide a letter served and received on 31st July, 2025.

D. NATURE OF THE COMPLAINT

9. The Complainant alleged that the Respondent processed her image without her consent for marketing and commercial purposes.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

- 10. The Complainant states that on or about the 20th day of December 2024, the Respondent published her image on store banners at its Kisumu Branch bearing the words: *"HOLIDAY PROMO: SHOP AT CHINA SQUARE AND ENJOY EXCLUSIVE CONNECT COFFEE DEALS."*
- 11. The Complainant further states that the said image and promotional material were also published on the Respondent's official Facebook/Meta page under the handle *"China Square Kenya."*
- 12. She avers that the photograph in question was taken without her knowledge or consent.
- 13. She pleads that the use of her image was intended to enhance the Respondent's store visibility and profitability through product promotion.

14. The Complainant states that, through her Advocates, she issued a demand letter dated 17th February 2025 seeking an explanation for the use of her image in the Respondent's advertising and promotional materials which the Respondent acknowledged and confirmed that the image and the banner had been removed from both the physical store and its official Facebook page.
15. The Complainant asserts that her image remained in circulation across the Respondent's physical and digital platforms from 20th December 2024 until 17th February 2025, when it was taken down following receipt of her demand letter.
16. The Complainant avers that the Respondent's use of her image has resulted in public perception that she is, or was, affiliated with the Respondent as a brand ambassador, which is false and misleading.
17. The Complainant states that, in the same promotional postings, the Respondent routinely blurred the images of other customers; however, no such blurring was applied to her image, thereby singling her out without justification.
18. As evidence, the Complainant attached -
- i. A picture of the banner at the Respondent's retail store with her image on it.
 - ii. Printed screenshots of the Respondent's Facebook page showing the banner at the Respondent's retail store with her image on it.

ii. THE RESPONDENT'S RESPONSE

19. The Respondent in its statement of response stated, that all its stores, including the Kisumu branch, display a disclaimer at the entrance notifying customers that photography and videography may occur for marketing purposes. It asserts that entry into the premises amounts to implied consent unless an objection is raised at the customer service desk, which in its opinion constitutes valid consent.
20. The Respondent denies that the Complainant's image was used for commercial exploitation. It maintains that the image appeared as part of a general festive

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promotional banner and was not linked to the Complainant by name, endorsement, or association with any specific product or role.

21. The Respondent pleads that the use of the Complainant's image complied with the transparency and notification requirements. It further avers that the image was not captured covertly, was taken within a public area of the store, and that the data processing was lawful.

22. The Respondent states that, as part of its mitigation efforts, it has reviewed its internal media and image use policies, developed image release forms for future campaigns, and intends to conduct staff training on data protection compliance.

F. ISSUES FOR DETERMINATION

23. It is undisputed that the Respondent used the Complainant's image on a public banner and Facebook social platform.

24. In light of the above, the complaint, the Respondent's responses and evidence adduced together with the investigations conducted, the following issues fall for determination by this Office:

- i. Whether the Respondent obtained the Complainant's consent as required by law;
- ii. Whether there was a violation of the Complainant's right to erasure; and
- iii. Whether the Complainant is entitled to remedies under the Act.

I. WHETHER THE RESPONDENT OBTAINED THE COMPLAINANT'S CONSENT AS REQUIRED BY LAW

25. 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 [Emphasis].

26. 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.
27. 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. 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 to the processing.
28. To ensure that the Respondent obtained specific and informed consent, they ought to have, at a minimum, provided the following –
- a. The data controller and data processor's identity: the data controller or data processor must identify itself and name any third party who will be relying on the consent.
 - b. The purpose of the processing: a consent request must specifically cover all purposes for which the consent is sought.
 - c. The processing activities: granular consent options for each separate type of processing should be provided unless those activities are clearly interdependent.
 - d. The right to withdraw consent at any time: details of how a data subject may exercise their right to withdraw consent should be provided.
29. Further, the element 'free' implies real choice and control for the data subject. If they feel compelled or will endure negative consequences if they do not consent, then consent will not be valid.
30. Valid consent is thus a product of conscious decision-making and requires affirmative action. It should be demonstrable and capable of being proven. The Respondent did

not provide evidence that they obtained express consent from the Complainant to process her personal data on social media.

31. The Act goes further to state the conditions of consent. It states as follows concerning the conditions of consent at Section 32: -

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)

32. Section 37 (1) of the Act provides for commercial use of data and states, "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 the data subject or is authorised to do so under any written law and the data subject has been informed of such use when collecting the data from the data subject."

33. Regulation 14 (1) of the Data Protection (General) Regulations 2021 further elaborates Section 37 of the Act as follows: -

14. Interpretation of commercial purposes

(1) for the purposes of section 37 (1) of the Act, a data controller or 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.

34. It is undisputed that the Respondent used the Complainant's image on a publicly available banner and its Facebook social platforms to advance the Respondent's commercial and economic interests. By the general public visiting the Respondent's physical retail outlet or Facebook social media platform, one is induced whether directly or indirectly to buy, join and or subscribe to the Respondent's services. This constituted the use of the Complainant's image for commercial purposes which required express consent.
35. The "alleged disclaimer" notices merely constitute notification that photography may occur and do not meet the threshold of valid consent under the Act. Disclaimers cannot substitute for consent, as they do not satisfy the requirements for informed, affirmative, and explicit agreement as envisaged under the Act. Therefore, the Respondent cannot rely on these disclaimers to demonstrate valid consent.
36. Further, consent can only be proven by the Respondent as the burden of proof establishing a data subject's consent to the processing of their personal data for a specified purpose rests upon the data controller. The Respondent herein did not furnish the Office with evidence demonstrating and/or showing that indeed the Complainant expressly consented to the use of her image on public banners and on social media platforms.
37. From the above, it therefore follows that the Respondent has not discharged its burden of proof to demonstrate that the Complainant expressly consented to the use of his image for commercial purposes, as envisaged under Section 32 (1) and 37 of the Act.
38. This Office therefore finds that the Respondent did not obtain the requisite consent required by the Act to use the Complainant's image for commercial purposes.

II. WHETHER THE RESPONDENT VIOLATED THE COMPLAINANT'S RIGHT TO ERASURE

39. Section 40 of the Act also provides for the right of rectification and erasure and states that a data subject may request a data controller or processor to erase or destroy without undue delay personal data that the data controller or data processor is no longer authorized to retain, irrelevant, excessive or obtained unlawfully.
40. Further to the above, Regulation 12 (3) of the General Regulations provides that a data controller or data processor shall respond to a request for erasure within fourteen days of the request.
41. The Complainant states that through her advocates, she requested the Respondent to cease the use and to immediately remove her image from the public banner and Facebook platform. Both parties acknowledge that this request was promptly and effectively complied with.
42. This Office therefore finds that the Respondent did not violate the Complainant's rights as envisaged under the Act.

III. WHETHER THE COMPLAINANT IS ENTITLED TO REMEDIES UNDER THE ACT.

43. According 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.
44. Having considered the merits of the complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent processed the Complainant's image for commercial purposes without the requisite consent as stipulated under the Act, it therefore, follows that there has been a violation of the Act by the Respondent to that extent.

45. 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.
46. The Respondent's claim of good faith by removing the images on its Instagram and Facebook social platforms upon receipt of the demand letter does not negate the breach. The violation occurred at the moment the image was collected and processed on the public banner and on social media without the Complainant's express consent. The Respondent remains liable for this breach, notwithstanding its subsequent removal of the images.
47. 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.
48. The Complainant sought various remedies including that the Respondent takes down the post from its public platforms and compensation.
49. Having found that the Respondent is not able to prove that it obtained express consent from the Complainant for the use her image on its public social media platforms, the Respondent is hereby directed to compensate the Complainant the amount of **Kshs. 250,000/= (Kenya Shillings Two Hundred and Fifty Thousand Shillings Only)** for the use of the Complainant's image for commercial purposes without express consent. The Office also took into consideration that the said images have since been removed from the social media pages.
50. Section 58 of the Act as read together with Regulations 14 and 16 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 further contemplates, as a remedy, the issuance of enforcement notices against an entity that has failed or is failing to comply with any provisions of the Act and the attendant regulations thereto.

51. Having found that the Respondent violated the Complainant's right to be informed, and that it did not fulfill its obligations provided for under the Act, the Office hereby orders for an enforcement notice to be issued against the Respondent

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for the use of the Complainant's image for commercial purposes without express consent;
- ii. The Respondent to pay the Complainant a sum of **KES 250,000/= (Kenya Shillings Two Hundred and Fifty Thousand Shillings Only)** as compensation;
- iii. An Enforcement Notice be issued upon the Respondent; and
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 8th day of August 2025



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER



OFFICE OF THE DATA PROTECTION COMMISSIONER

When replying please quote
Ref: ODPC/CIE/CON/2/1 (543)

Britam Tower
P.O. Box 30920 - 00100
NAIROBI

Email: complaint@odpc.go.ke

11th August 2025

The Chief Executive Officer
I&M Bank Kenya Limited
Kenyatta Avenue
P.O Box 30238-00100
NAIROBI

"Advance copy by email"
dpo@imbank.co.ke

RE: NOTICE OF A SITE VISIT IN RELATION TO COMPLAINT NO. ODPC/COMP/0798/2025 FILED AGAINST I&M BANK KENYA LIMITED

The above subject matter and your letter dated 30th July 2025 refer.

The Office has reviewed your response following the Notification of Complaint and the evidence provided and would wish to verify the contents of your response contained in your letter.

Pursuant to Section 57 of the Data Protection Act, 2019, a team of investigators from this Office will visit your premises on **26th August 2025** at **11:00** am to conduct investigations on your records, databases, systems, and any other relevant documents that you wish the office to consider when determining the complaint investigation.

To enable this Office to give proper consideration to this matter, please ensure the following persons are in attendance on the said date:

- a) Your Data Protection Officer (if any);
- b) An ICT personnel member with access and sufficient knowledge of your systems including databases;
- c) A duly authorized representative to issue an official statement on behalf of I&M Bank Kenya Limited.

Kindly also ensure that all relevant documentation in response to the Notification of complaint is availed during the site visit.

Please Note: –

1. A person who fails or refuses to comply with a notice, or who furnishes to the Data Commissioner any information which the person knows to be false or misleading, commits an offence.
2. Failure to take any action as contemplated in this notification will result in the Data Commissioner determining the complaint in accordance with the Act and the Regulations.

Should you require any further clarification, please do not hesitate to contact the Office through dpo.ci004@odpc.go.ke and copy to complaint@odpc.go.ke



Emmanuel Maiyo

For: DATA COMMISSIONER

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