



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1824 OF 2024

**BENJAMIN OUMA..... COMPLAINANT
(SUING ON BEHALF OF E***** L***** LEGAL GUARDIAN OF KDA MINOR)**

-VERSUS-

**DMI EDUCATION SERVICES LTD OPERATING AS ST. JOSEPH
INTERNATIONAL SCIENCE SCHOOL 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 7th November 2024 alleging that the Respondent used the minor’s images for advertisement on their billboard without the minor’s parent’s 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 on 9th December 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by the Complainant 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 *vide* a letter dated 9th December 2024 referenced ODPC/CONF/1/5/VOL II (351). Further, the Respondent was asked to provide this Office with the following :-
 - a) A response to the allegations made by the Complainant.
 - b) A contact person who can provide further details as regards the complaint.
 - c) Any relevant materials or evidence in support of its response above.
 - d) The lawful basis to use the minor's image for commercial purposes.
 - e) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the complainant.
 - f) Demonstration (by way of written statement) of the level of compliance with the requirements under the Act and Regulations.
 - g) Any other information it wished the Office to consider.

8. The Respondent did not respond to the Notification of Complaint letter.
9. This determination is therefore a result of analysis of the complaint as received, the response by the Respondent and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

10. The Complainant alleged that the Respondent, without proper and/ or justifiable cause, used the minor's image for advertisement on a billboard without the parent's consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

11. The Complainant alleges that the Respondent used the photo of KDA (minor) on their advertisement billboard without the knowledge and consent of his parents.
12. The Complainant asserts that the incident happened around December 2022 when the kids had gone for a fun day at the school where they were lured by the Respondent to put on uniforms and their photos taken.
13. The Complainant states that the minor was not and is not a student at the said school. Though the School had used the billboard for a while the mother learnt of the same sometime in March, 2024.
14. As a result, the Complainant seeks compensation from the Office on the basis that the advertisement of the school using the minor in question must have attracted more students and hence made profits out of it.
15. The Complainant adduced the following as part of his evidence:
 - i. The Minor's Photograph
 - ii. A photograph of the impugned mini billboard where the minor's photograph appeared.
 - iii. The Minor's birth certificate
 - iv. Letter of authorization by E***** L***** dated 4th November 2024.
 - v. Copy of National Identity Card of E***** I*****

ii. THE RESPONDENT'S RESPONSE

16. The Respondent did not submit a response to the Notification of Complaint letter that was served to them physically at the school on 11th December 2024. The allegations are therefore uncontroverted.

G. ISSUES FOR DETERMINATION

17. The undisputed facts in this case are:-

- a) That the Respondent while introducing new school uniforms took the minor's photograph dressed in the new school uniforms and placed it on a banner and or mini-board to showcase/ advertise the new uniform to the school population.
- b) The banner/ mini bill board has since been pulled down by the school.

18. That being said the following issues fall for determination by this Office:

- i. Whether the Respondent obtained express consent from the minor's parent to process the minor's personal data for commercial purposes; and
- ii. Whether the minor's parent is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENT OBTAINED EXPRESS CONSENT FROM THE MINOR'S PARENT TO PROCESS THE MINOR'S PERSONAL DATA FOR COMMERCIAL PURPOSES.

19. It is the Complainant's position that the minor's photograph was taken and used for advertisement without the parent's consent.

20. Section 33 of the Act provides for processing of personal data relating to a child. It provides that every data controller or data processor shall not process personal data relating to a child unless:

- a. Consent is given by the child's parent or guardian; and
- b. The processing is in such a manner that protects and advances the rights and best interests of the child.

21. 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.

22. 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.

23. 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)

24. From the evidence adduced to this Office, it is evident that at all material times when the Respondent was processing the minor's personal data, it required the minor's parent's consent, and the burden of proof of consent rests upon the Respondent as stated under Section 32 (1) of the Act.

25. The Respondent has not discharged this burden of proof as it has not adduced and/or produced evidence of the consent that it relied upon to use the minor's image for advertising the new school uniforms on the billboard.

26. 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.
27. 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.
28. The Complainant adduced evidence to demonstrate that the Respondent used the minor's image on a mini bill board to advertise the school and the new uniform.
29. That being said, it therefore follows that the Respondent has not discharged its burden of proof to demonstrate that the minor's parent expressly consented to the use of the minor's image for commercial purposes, as envisaged under Section 32 (1) and 37 of the Act.
30. This Office therefore finds that as far as issue no (i) is concerned, the Respondent did not obtain express consent from the minor's parent to process the minor's personal data for commercial purposes.

II. WHETHER THE MINOR'S PARENT IS ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS.

31. Pursuant to Regulation 14 (2) of the Enforcement Regulations, a determination shall state the remedy to which the Complainant is entitled. The remedies are provided for in Regulation 14 (3) of the Enforcement Regulations.
32. 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.

33. 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.

34. Having considered the merits of the Complaint, the evidence and having found that the Respondent processed the Minor's data without his guardian's consent, it therefore, follows that there has been a violation of the Act by the Respondent to that extent. The Respondent did not process the minor's personal data in accordance with Sections 30 (1) (a), 32 (1) and 37 of the Act.

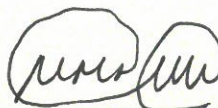
35. Having found that the Respondent did not obtain express consent for use of the minor's image from the minor's parent, the Respondent is hereby directed to compensate the minor's parent the amount of **Kshs. 700,000/= (Seven Hundred Thousand Shillings Only)** for processing of the minor's personal data for commercial purposes without express consent.

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for use of the minor's personal data for commercial purposes without express consent.
- ii. The Respondent is ordered to compensate the minor's parents **KES 700,000/= (Seven 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 4th day of February 2025.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

