



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1951 OF 2024

SAMUEL KAMAU WAWERU.....COMPLAINANT

-VERSUS-

PLATINUM CREDIT 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 on 27th November 2024 alleging that the Respondent and or its sales agent/ representative has constantly been sending him unsolicited text messages and calls, promoting its loan products, without his knowledge/authorization.

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 27th November, 2024. 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 Respondent of the complaint filed against it *vide* a letter dated 11th December 2024 and referenced ODPC/CONF/1/5 VOL II (366). In the Notification of the Complaint, the Respondent was informed that if the allegations by the Complainant were true, it was 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 it by the Complainant;
 - b. A contact person who can provide further details as regards to the complaint;
 - c. The lawful basis relied upon to process and engage with the Complainant's personal data;
 - d. Any relevant materials or evidence in support of the response;

- e. A detailed procedure on how data subjects can exercise their data protection rights;
 - f. The contractual agreement with the complainant, if any;
 - g. The Respondent's data protection policy;
 - h. Details of how the Respondent collected, stored, and processed the complainant's personal data, and whether he consented to the processing of his personal data;
 - i. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint does not take place again; and
 - j. Any other relevant information it wishes the Office to consider.
8. The Respondent submitted its response to the Notification of Complaint letter *via* a letter dated 19th December, 2024.
9. This determination is therefore as 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 Complaint relates to the alleged contacting of the Complainant by the Respondent and or its representatives to promote its loan products, without obtaining consent the Complainant's knowledge and or authority.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. It was the complainant's case that sometime on 15th November 2024, he received an unsolicited call from a sales representative of Platinum Credit Limited, who identified herself as V***** of phone number 07xxxxxx63.
12. The Complainant alleged that whilst making the call, the sales representative had access to his personally identifiable information, including specific details of his vehicle details.

13. The Complainant further alleged that upon questioning of the sales representative of the source of his personal data, the sales representative told him that the organization's management routinely shared such data with the sales team for them to contact and advertise the Respondent's products to potential customers.

14. The Complainant further alleged that he had never interacted/ engaged with the Respondent in any business or communication, and he did not consent for his personal data to be collected, stored or shared by the Respondent.

ii. THE RESPONDENT'S RESPONSE

15. The Respondent stated that upon thorough investigation, it confirmed that the Complainant has never been a customer of its company, and thus, it does not have his information or data stored in its database.

16. The Respondent stated that they conducted a comprehensive internal investigation to identify the source of the communications, if any. Its investigations established that one of the numbers, 07XXXXXX63, registered to a person identified as V***** by the Complainant as alleged to have contacted the Complainant is neither associated with its agents nor registered to its employees.

17. In a nutshell, the Respondent blanketly denied all the allegations fronted against it and denied of knowing Vivian at all.

F. INVESTIGATIONS UNDERTAKEN

18. In exercising its investigative mandate as provided for in the Act, this Office conducted an on-site visit and investigation on the Respondent on 11th December 2024.

19. During the site visit the Respondent attempted to validate their response to this Office. It maintained that the number belonging to V***** was not affiliated with the company and any communication from the said number should not be attributed to them.

20. After the site visit investigations, the investigative team summoned the said V***** to the Office to come and shed more light on the complaint.

21. Additionally, V***** recorded a statement. She stated the nature of the engagement she had with the Respondent. She went further and described the Respondent's mode of operations.
22. She further stated that she used to work for the Respondent as a sales agent as from October 2024 up to the date when she contacted the Complainant herein. She stated that on the material day when she contacted the Complainant, the Complainant lodged a complaint with the Respondent raising issues on where the Respondent had obtained his personal data.
23. She further stated that when the Complainant raised issues with the Respondent regarding his personal data, she was told to start working from home to avoid being found by our investigators in the Respondent's premises/ offices.
24. She stated that on a normal day they used to work in teams wherein her team comprised of 4 people, 3 sale agents/ representatives and one team leader by the name E***** N***. She stated that her team was called 'Team N***', named after its team leader.
25. She stated that their team leader, on numerous occasions, used to share documents with the team in the form of an excel sheet containing individuals' names, ID Numbers, phone numbers, and vehicle registration numbers. After the same was shared, V***** and the rest of her colleagues would then be required to make calls and advertise the Respondent's products to the said potential customers.
26. V***** further stated that sometime on or about 15th November 2024, the excel sheet was distributed as usual. She stated that she was allocated a list that contained, among others the details of the Complainant.
27. She stated that upon receiving the list she made the call to the Complainant and marketed the Respondent's products.

28. She confirmed that indeed it is true that when she made the call to the Complainant, the Complainant inquired how she was able to get his number which she explained to him, that it was shared by the Respondent's management.
29. She stated that later on, she forwarded the matter raised to the team lead, E***** N*** and that sometime, on Monday 18th November 2024, she was called to the Manager's office together with the team lead in regards to the issue where the manager and the team leader reached a consensus of replying to the Complainant's email stating that that she was a free agent and had no relationship with the company.
30. After that, she was told to start working from home to avoid being found by the Office's investigators in the Respondent's premises.
31. To support her statement, V***** produced:-
- a) The Respondent's Job advertisement recruiting Sales Executives, which she applied.
 - b) An email forwarding to the Respondent the particulars for her application for the job.
 - c) A copy of her National Identification card.
 - d) Mpesa Statements showing receipt of money from the Respondent's management.
 - e) Screenshots of WhatsApp group conversations showing "excel sheet" shared by their team lead.
 - f) All correspondences between her and the Respondent's management for the entire period she had worked for the Respondent.
32. From the above investigations, and evidence collected, this Office was able to establish a nexus between V***** and the Respondent. V***** was the Respondent's agent and or sale representative at all material times related to this complaint.
33. By the Respondent maintaining that the number belonging to V***** was not affiliated with the company and any communication from the said number should

not be attributed to them, the investigations conducted revealed that the Respondent provided false information and or misleading information to the Data Commissioner which is an offence under Sections 57(3) as read with Section 73 of the Act.

G. ISSUES FOR DETERMINATION

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

- i. Whether the Respondent fulfilled its obligations under the Act; and
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

35. Having established that at all material times relating to this complaint, V***** was an agent with the Respondent, it therefore follows that the Respondent is a data controller within the definitions of the Act and therefore has obligations pursuant to the Act.

36. The Complainant alleged that he has been receiving unsolicited promotional calls from the Respondent and or its sales representatives/ agents, promoting its loan products, without his knowledge, permission and or consent.

37. As stated above under part (F) of this determination, our investigations revealed that indeed the Complainant was contacted by one of the Respondent's agents.

38. Section 30 of the Act gives instances where a data controller or processor can lawfully process personal data and states that, "*a data controller or processor shall not process data unless the data subject consents to the processing for one or more specified purposes or the processing is necessary for the reasons given in subsection (b).*"

39. Section 37 of the Act provides 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; or is authorized 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.

40. Regulation 14 (1) of the Data Protection (General) Regulations 2021 ('the General Regulations') further provides that 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.

41. By contacting the Complainant informing him about the company's products, the Respondent's agents were advancing the Respondent's commercial/ economic interests. They were marketing the Respondent's products to the Complainant.

42. On its part, Regulation 15 of the General Regulations sets out the permitted commercial use of personal data as follows:-

15. Permitted commercial use of personal data

(1) A data controller or data processor may use personal data, other than sensitive personal data, concerning a data subject for the purpose of direct marketing where-

(a) the data controller or data processor has collected the personal data from the data subject;

(b) a data subject is notified that direct marketing is one of the purposes for which personal data is collected;

(c) the data subject has consented to the use or disclosure of the personal data for the purpose of direct marketing;

(d) the data controller or data processor provides a simplified opt-out mechanism for the data subject to request not to receive direct marketing communications; or

(e) the data subject has not made an opt-out request.

(2) A data controller or data processor shall not transmit, for the purposes of direct marketing, messages by any means unless the data controller or data

processor indicates particulars to which a data subject may send a request to restrict such communications without incurring charges. (Emphasis supplied)

43. As can be seen from the above, consent of the data subject is crucial for the use of personal data for direct marketing.
44. The conditions of consent are provided under Section 32 of the Act which provides that a data controller shall bear the burden of proof to establish that the data subject consented to the processing of their personal data for a specified purpose.
45. It was upon the Respondent to prove that it obtained express consent from the Complainant before sending promotional messages to him. This burden was not discharged by the Respondent as it failed to prove that it had obtained express consent from the Complainant to send promotional messages to him.
46. Having established that V***** was the Respondent's agent and that the Respondent did not obtain the Complainant's consent before the processing of his personal data, this Office therefore finds that as far as issue no **(I)** is concerned, the Respondent did not fulfill its obligations as envisaged under the Act. The Respondent unlawfully processed the Complainant's personal data for commercial interest and or purpose.

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

47. 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.
48. Having considered the merits of the Complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent did not fulfil its obligations as required by the Act, it therefore, follows that there has been a violation of the Act by the Respondent to that extent.
49. 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.

50. This Office is guided accordingly and an Enforcement Notice hereby ensues as against the Respondent.

51. 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.

52. 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.

53. The Complainant claimed for the remedy of compensation against the Respondent. The Respondent did not respond to this prayer for the remedy of compensation.

54. Having found that the Respondent processed the Complainant's personal data unlawfully for commercial interest and or purpose, the Respondent is hereby directed to compensate the Complainant **KES 400,000/- (Four Hundred and Thousand Shillings Only)**.

55. In addition to the Respondent contravening the provisions of the law as espoused above, the Respondent also committed the offence stipulated in Section 57(3) as read with Section 73 of the Act.

56. Section 57 (3) of the Act provides that a person who, without reasonable excuse, 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. The general penalty is set out in Section 73 of the Act which states that person who commits an offence under the Act for which no specific penalty is provided or who otherwise contravenes this Act shall, on conviction, be liable to a

fine not exceeding three million shillings or to an imprisonment term not exceeding ten years, or to both.

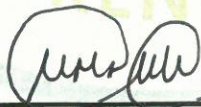
57. As such we are guided accordingly, and we hereby recommend the prosecution of the Respondent's directors pursuant to Section 57(3) as read with Section 73 of the Act.

H. FINAL DETERMINATION

58. 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 Four Hundred and Thousand (KES. 400,000/=)** as compensation;
- iii. An Enforcement Notice is hereby issued to the Respondent.
- iv. A recommendation for prosecution is hereby made against the Respondent's directors for furnishing to the Data Commissioner information which they knew to be false or misleading, an offence under Section 57(3) as read with Section 73 of the Act; and
- v. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 24th day of February 2025.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

