



## OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1859 OF 2024

**MARLENE NGINA MATUNGA.....COMPLAINANT**

**-VERSUS-**

**WHITEPATH COMPANY LIMITED.....RESPONDENT**

### **DETERMINATION**

*(Pursuant to Sections 8(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 alleged that the Respondent processed her personal data without a lawful basis by repeatedly calling her using different numbers and sending her text messages about her colleague, who had purportedly taken an online loan with the Respondent.

#### **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 14<sup>th</sup> November, 2024. 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 9<sup>th</sup> December, 2024 referenced ODPC/CONF/1/5 VOL II (352). In the notification of the complaint, the Respondent was informed that if the Complainant's allegations were true, they would be in violation of various sections of the Act. Additionally, the Respondent was 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 of your response above;

- d) Your contractual obligation with the Complainant, if any;
- e) Details on how you obtained the Complainant's personal data;
- f) A detailed procedure on how data subjects can exercise their data protection rights;
- g) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
- h) The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again, if any;
- i) Any other relevant information you wish the Office to consider.

#### **D. NATURE OF THE COMPLAINTS**

- 8. The Complainant alleged that the Respondent violated her right to privacy by processing her personal data without a lawful basis. She stated that the Respondent had repeatedly contacted her using different phone numbers and sent her text messages regarding her colleague, whom the Respondent claimed was one of its clients.
- 9. According to the Respondent, this colleague had taken an online loan from one of its products and defaulted on repayment. The Respondent demanded that the Complainant reach out to the defaulting party and urge her to settle the outstanding loan. Furthermore, the Respondent alleged that the client had provided the Complainant's details as a guarantor, implying that if the loan remained unpaid, the Complainant would be responsible for repaying it.

#### **E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED**

##### **i. THE COMPLAINANT'S CASE**

- 10. The Complainant received multiple calls and texts from different numbers from the Respondent's agents regarding a defaulted loan from a person whom she identified as her colleague.
- 11. The Complainant stated that the Respondent alleged that they were contacting her on behalf of a defaulting third party regarding an unsettled loan where the

Complainant was listed as a guarantor. Furthermore, the Respondent demanded that she engages the third party and persuade her to settle her defaulted loan, failure to which as a listed guarantor she would have to settle the third party's loan.

12. The Complainant pleads that she did not have any prior knowledge of the financial relationship between the loanee and the Respondent and neither was she privy to any transactions thereof.

13. The Complainant further states that the Respondent did not seek for consent prior to listing her as a guarantor.

14. The Complainant asserts that the Respondent's repeated threats, false accusations, and inconsistent claims have caused her distress and could harm her personal and professional reputation.

15. The Complainant further asserts that she is neither familiar with the Respondent nor a client or a guarantor whatsoever; and thus, questions how the Respondent obtained her contact details.

#### **ii. RESPONDENT'S RESPONSE**

16. The Respondent was non-responsive and did not respond to the Notification of Complaint filed against it. Therefore, the allegations levelled against it remain uncontroverted.

#### **F. INVESTIGATIONS UNDERTAKEN**

17. This Office analyzed the complaint as received and reviewed the documents submitted by the Complainant as evidence.

#### **G. ISSUES FOR DETERMINATION**

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

- i. Whether there was a violation of the Complainant's rights under the Act;
- ii. Whether the Respondent fulfilled its obligations under the Act; and

- iii. Whether the Complainant is entitled to the remedies under the Act and the attendant Regulations.

**I. WHETHER THERE WAS A VIOLATION OF THE COMPLAINANT'S RIGHTS UNDER THE ACT**

19. Section 26(a) of the Data Protection Act recognizes the right of a data subject to be informed about the purposes for which their personal data will be processed. The Respondent failed to inform the Complainant that it would collect and process her personal data, that is her personal telephone number, for the purpose of third-party debt recovery. This omission constitutes a violation of the Complainant's right to be informed.
20. Furthermore, the Respondent did not provide any response to the notification of the complaint raised against it. As a result, it failed to present evidence demonstrating that the Complainant had been informed about the collection, processing, or intended use of his personal data.
21. Based on the foregoing, this Office finds that the Respondent violated the Complainant's right to be informed about the purposes for which his personal data was collected and processed, as required under Section 26(a) of the Act.

**II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT;**

22. The Respondent is a data controller within the definition of the Act and therefore has obligations pursuant to the Act.
23. The Respondent had an obligation under Section 25(a) of the Act to ensure that personal data is processed in accordance with the right to privacy of the data subject and Section 25(c) of the Act to ensure that personal data is collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes.

24. Section 29 of the Act provides an obligation to data controllers or data processors of the duty to notify the data subject. Notably, the data subject has to be informed of, *inter alia*;

- i. rights specified under Section 26;
- ii. the fact that personal data was being collected;
- iii. the purpose of collection of their personal data;
- iv. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

25. The Respondent had a duty to notify the Complainant of his rights under the Act, prior to the collection and processing of her personal data. It was also the Respondent's duty to notify the Complainant of the fact that it intended to use her personal data for third-party debt recovery and accord the Complainant an opportunity to consent or deny consent to such use and/or processing.

26. Section 30 of the Act gives instances where a data controller or data processor can lawfully process personal data. It states 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 or the processing is necessary for the reasons given in subsection (b).*" The Respondent failed to provide proof of having obtained consent to process the Complainants' personal data for purposes of third-party loan recovery. Further, the Respondent did not prove that it satisfied the reasons outlined in Section 30(1)(b) that allow for the processing of personal data without obtaining consent from the data subject.

27. From the foregoing, this Office finds that the Respondent did not fulfil the above obligations as set out under the Act.

### III. WHETHER THE COMPLAINANT IS ENTITLED TO THE REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS

28. 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.
29. As a remedy, the Complainant requested that the Office orders the Respondent to compensate her for the violation of privacy and the consequences of the emotional and psychological harm.
30. Section 65(1) of the Act provides, that a person who suffers damage by reason of a contravention of a requirement of this Act is entitled to compensation for that damage from the data controller or the data processor. Section 65(2) provides, a data controller involved in processing of personal data is liable for any damage caused by the processing.
31. Section 65(4) of the Act provides that "damage" includes financial loss and damage not involving financial loss, including distress.
32. Having found that the Respondent failed to uphold the Complainant's right to be informed of the use to which her personal data would be put and that the Respondent processed the Complainant's personal data unlawfully, it then follows that the Complainant is entitled to compensation. The Respondent is hereby directed to compensate the Complainant **KES 450,000 (Four Hundred and Fifty Thousand Kenya Shillings)**. In so doing, this Office takes into account the negligent and intentional conduct of the Respondent in unlawfully processing of the Complainant's personal data.
33. The Complainant has requested that this Office orders the Respondent to immediately cease any further violations of her privacy. This request will be addressed in the enforcement notice to be issued against the Respondent, in order to ensure compliance with the provisions of the Data Protection Act and to protect the Complainant's rights.

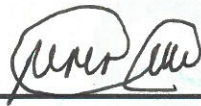
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## H. FINAL DETERMINATION

34. The Data Commissioner therefore makes the following final determination;

- i. The Respondent is hereby found liable.
- ii. The Respondent is hereby directed to compensate the Complainant **KES 450,000 (Four Hundred and Fifty Thousand Kenya Shillings)**.
- iii. An enforcement notice to hereby issue against the Respondent.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

**DATED** at **NAIROBI** this 11<sup>th</sup> day of February 2025



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**IMMACULATE KASSAIT, MBS**  
**DATA COMMISSIONER**