



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1963 OF 2024

VINCENT MUEMA NDUKU.....COMPLAINANT

-VERSUS-

SINOMA ROOFING SYSTEM.....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 has been using the Complainant's image on its social media platform for commercial gain without express 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

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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 26th 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 9th December, 2024 referenced ODPC/CONF/1/5 VOL II (346). 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;
 - 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) A detailed description of whether you fulfil data subjects' rights and how the same is achieved.
 - e) A detailed description of your compliance with data protection requirements, particularly regarding the lawful processing of personal data for commercial 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 do not take place again;
- h) Any other information you wish the Office to consider.

8. The Respondent was non-responsive.

D. NATURE OF THE COMPLAINT

9. The Complainant alleged that the Respondent, without proper and/or justifiable cause, collected and processed his image without his consent for marketing and commercial purposes on its official social media platforms.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

- 10. The Complainant asserts that the Respondent posted his photos on its *Uni Roof* Facebook page and *uni_roofke* Instagram page to market and advertise an upcoming workshop.
- 11. The Complainant further states that his image was first posted on Facebook on 15th May 2024 and later on or about the said date on Instagram.
- 12. The Complainant avers that at all material time he was unaware that the Respondent used his photos. He was not informed of the collection or the intended processing and only discovered the unauthorized use of his image while browsing social media.
- 13. While he acknowledges the marketing intent behind the posts, he alleges that the Respondent's actions violated his right to data privacy under the Act.
- 14. As evidence, the Complainant attached:
 - i. Screenshots of the alleged photographs taken from the Respondent's Facebook and Instagram pages.
 - ii. Recent photographs of himself to as evidence that he is the person in the Respondent's social media pages.
 - iii. A publicly available copy of the Respondent's CR12.



ii. THE RESPONDENT'S RESPONSE

15. The Respondent failed to respond to the notification of complaint dated 9th December, 2024, Reference No: ODPC/CONF/1/5/VOL II (346), which was served via email on 10th December 2024 and physically served on the Respondent on 17th December 2024.

16. The Complainant's allegations remain uncontested.

F. INVESTIGATIONS UNDERTAKEN

17. The investigation process entailed a review of available documentation, that is, the Complainant's supporting evidence, including screenshots of the Respondent's social media posts.

18. The Respondent was unresponsive and so the Complainant's allegations remained unchallenged.

G. ISSUES FOR DETERMINATION

19. It is undisputed that the Respondent used the Complainant's image on its Facebook and Instagram public social media platforms to advertise and market its workshop event.

20. 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 the Act to use his image for commercial purposes; and
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENT OBTAINED THE COMPLAINANT'S CONSENT AS REQUIRED BY THE ACT TO USE HIS IMAGE FOR COMMERCIAL PURPOSES

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. 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.
23. From a combined reading of the above definitions, it is apparent that valid consent is a product of conscious decision-making and requires affirmative action. It should be demonstrable and capable of being proven.
24. 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.
25. The Act goes further to state the conditions of consent. It states as follows concerning 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)

26. 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."

27. 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.

28. It is undisputed that the Respondent used the Complainant's image in its Facebook and Instagram public social media platforms to advertise and market its workshop event. As such, the Complainant's image was being used to advance the Respondent's commercial and economic interests. By the general public visiting the Respondent's Facebook and Instagram pages 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.

29. It is trite that 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.

30. The Respondent herein did not furnish the Office with a statement of response. Additionally, at all material times, the Respondent remained unresponsive, and so the Complainant's allegations stand undisputed.

31. From the above, it therefore follows that the Respondent failed to discharge 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.

32. This Office therefore finds that as far as issue no (i) is concerned, the Respondent did not obtain the requisite consent required by the Act to use the Complainant's image for commercial purposes.

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

33. 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.

34. The Complainant requested for an apology from the Respondent. However, an apology is not one of the remedies contemplated under Regulation 14(3) of the Enforcement Regulations and therefore the same is denied.

35. Further, the Complainant prayed for deletion of his images from the social media pages of the Respondent. However, the Complainant has not demonstrated whether they exercised the said right before the Office can make a determination on the same.

36. The Complainant prayed for an award of compensation. 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.

37. 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.

38. The Complainant sought various remedies, including an official and formal apology from the Respondent, the deletion of his photos from its social media pages, and the surrender of all copies of the images captured of him. Additionally, he demanded that the Respondent admit liability and provide compensation for the violation occasioned.

39. Having found that the Respondent is not able to prove that it obtained express consent from the Complainant, and the Respondent's continued use of the Complainant's image on its Facebook and Instagram social media pages, the Respondent is hereby directed to compensate the Complainant the amount of **Kshs. 500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only)** for the continual use of the Complainant's image for commercial purposes without express consent.

I. FINAL DETERMINATION

40. 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 **Kenya Shillings Five Hundred Thousand (Kshs. 500,000)** as compensation; and
 - iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 23rd day of February 2025



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER