



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1687 OF 2024

RISPER ONYANGO.....COMPLAINANT

-VERSUS-

SUNKING 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 the complaint on 23rd October 2024 against the Respondent alleging that the Respondent has been sending her unwanted messages at least two times a week consistently for the past year despite her not being their client.

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 23rd October, 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by the advocates for the Complainant on behalf of 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 25th November, 2024 and referenced ODPC/CONF/1/5 VOL II (319). 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 by the Complainant and, a contact person who can provide further details as regards this complaint.
 - b. Any relevant materials or evidence in support of the response.
 - c. The legal basis relied upon to process and engage with the complainant's personal data.

- d. A Copy of the contractual relationship between the Respondent and the Complainant.
 - e. Details of how the Respondent obtained, stored, and processed personal data, and whether the complainant consented to the processing of their personal data for promotional purposes.
 - f. A statement outlining an opt-out mechanism as provided for by Section 16 of The Data Protection (General) Regulations, 2021.
 - g. An elaborate representation of how data subjects can exercise their rights in relation to data protection;
 - h. 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 do not take place again; and
 - i. Any other information the Respondent wishes for the Office to consider.
8. The Respondent did not respond to the Notification of Complaint.
9. This determination is therefore as a result of analysis of the complaint as received, the response submitted by the Respondent and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

10. The Complainant lodged a complaint against the Respondent alleging that the Respondent has been sending her unwanted messages at least two times a week consistently for the past year despite not being their client. The content of the messages revolves around the allegation by the Respondent of the Complainant's outstanding balance of particular products hence being up for auction.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant alleges that the Respondent sent her unwanted messages at least two times a week consistently for the past year despite not being their client.

12. Further, the Complainant avers that the content of the messages relates to the claim that she has failed to pay for particular products hence was seemingly up for some sort of auction or unwelcome visit from the Respondent agents.
13. The Complainant alleges that she has been unable to reach out to the Respondent as no opt out option was in place from receiving the said messages.
14. Additionally, the Complainant asserts that she is not and has never been the Respondent's client and has never engaged with their products or services in any way.
15. Most recently, she states, one of the Respondent's staff called the Complainant where she finally got the chance to express her frustrations with their persistent messaging. The Complainant further made the request for the same stop.
16. The Complainant confirms that her request to be opted out of the messaging from the Respondent has not been adhered to as she was still receiving the threatening messages from the Respondent.
17. The Complainant provided screenshots of various messages from the Respondent.

ii. THE RESPONDENT'S RESPONSE

18. The Respondent did not respond to the notification of complaint dated 25th November 2024 from this Office. The allegations in the complaint remain uncontroverted.

F. INVESTIGATIONS UNDERTAKEN

19. The Office analysed the complaint as lodged and established that the Complainant received messages from the Respondent alleging debt for certain goods. The communications further stated that the outstanding amount must be paid in order to prevent being visited by the Respondent's agents.

G. ISSUES FOR DETERMINATION

20. In light of the above, 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 any remedies under the Act and the attendant Regulations.

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

21. Section 26 (a) of the Act provides for the right to be informed of the use to which a data subject's personal data is to be put.
22. The Respondent, by not informing the Complainant of the use to which his personal data was to be put at the point of collection of the personal data, violated her right to be informed. The Respondent collected the Complainant's mobile number and used it to contact the Complainant without a lawful basis.
23. From the foregoing, this Office finds that the Complainant's right to be informed under Section 26(a) of the Act was violated by the Respondent.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

24. The Respondent is a data controller as per the definitions of the Act and is therefore mandated to fulfil its obligations as such under the Act.
25. Section 28 (1) provides that a data controller shall collect personal data directly from the data subject. Section 28 (2) sets out instances where a data controller can collect personal data indirectly. The Complainant asserts that she was not the Respondent's client therefore she did not give the Respondent her personal data. The Respondent has not produced any evidence to the contrary.
26. Moreover, the Respondent has not proven that it had any basis for indirect collection of the Complainant's personal data stipulated in Section 28 (2) (c) of the Act.
27. Section 30 of the Act provides for the lawful basis of processing personal data and 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 purposes listed in sub-

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section 1 (b). The Respondent failed to establish that the Complainant has consented to the processing of her personal data or that Section 30(1)(b) of the Act applied to the processing.

28. In light of the above, this Office finds that the Respondent did not fulfil its obligations under the Act.

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

29. 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.

30. 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.

31. 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.

32. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's right under Section 26 (a) were infringed upon by the Respondent. The Respondent failed to inform the Complainant the use of her personal data and kept sending messages without a lawful basis.

33. In this context, the Respondent is hereby ordered to pay the Complainant **Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000)** for the infringement of her rights under the Act.


34. Having found that the Respondent failed to fulfill its obligations under the Act and attendant regulations, **an Enforcement Notice shall issue against the Respondent** pursuant to Section 58 of the Act and Regulation 16 of the Enforcement Regulations.

H. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for infringement of the Complainant's rights right to be informed under Section 26(a) of the Act.
- ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000)** as compensation.
- iii. An Enforcement Notice to hereby be issued to 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 20th day of January 2025.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

KENYA

