



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 1708 OF 2024**

**RICHARD WAFULA.....COMPLAINANT**

**-VERSUS-**

**HOTEL TOBRIANA.....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 25<sup>th</sup> October, 2024 alleging that the Respondent obtained his, his wife’s and their guests’ images and videos during their wedding, and shared the same in branded and personalized advertisement by the Respondent, without obtaining their 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 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 25<sup>th</sup> October, 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by advocates for the Complainant on behalf of 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 and referenced ODPC/CONF/1/5 VOL II (357). 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 and a contact person to provide further details as regards to the 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 agreement it had with the Complainant, if any;

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- e. An elaborate representation of how data subjects can exercise their rights in relation to data protection;
  - f. 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
  - g. Any other information it wishes the Office to consider.
8. Despite proper service of the aforementioned Notification Letter, the Respondent did not respond to the Complaint.
9. This determination is therefore as a result of analysis of the complaint as received and investigations conducted by the Office.

#### **D. NATURE OF THE COMPLAINT**

10. The Complaint relates to the alleged use of the Complainant's image by the Respondent for commercial purposes without obtaining the Complainant's, his wife's, their children and their guests' "written consent."

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

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

11. The Complainant states that on or about 30<sup>th</sup> August 2024, while getting married, he booked the reception of their wedding at the Respondent establishment. This was to allow for them, their children, and guests to be hosted at the Hotel. He posits that there was no approach by the Respondent's patron or manager for any "Written Consent" by them or their guests as parents for the minors involved. There was no further consent issued by the guests for their images and videos to be taken and/or shared in branded and personalized advertisements by the Respondent.
12. According to the Complainant, soon after the wedding, on two different dates specifically on the 5<sup>th</sup> of September and 9<sup>th</sup> of September 2024, the Respondent, without the Complainant's knowledge or consent, unlawfully used their photographs and videos in their marketing, promotions, and social media platforms.

13. These images and video were specifically posted –

- On Facebook (i.e 15 images and one video), where the Respondent's Facebook handle enjoys a following of 2,100 persons; and
- On Instagram (i.e. 14 images and one video) where the Respondent's Instagram handle enjoys a following of 4,000 persons.

14. The Complainant alleged that the said images and videos were posted with the unconsented and unsolicited marketing caption reading as follows;

*"#FinalQuarterOf2024 Are you planning an event? Wedding, Ruracio, Birthday Parties, Engagement Parties, Retirement Parties, Anniversary, Office End Year Parties, or any other form of PARTY at Hotel Tobriana you will get a personalized quote just for you that fits your budget Ridgeways-Jacaranda Close. Contact 07xxxxxxx0 for bookings."*

15. It is the Complainant's position that the images and videos comprise the Complainant, his wife Dxxxxs Mxxxxa, their Son J.O.W (Age 10) as well as family and friends, who continue to raise complaints to the Complainant. Consent as to the period of time intended for the use of the photos and videos for promotional activities was also not sought.

16. The Complainant states that the public display of the Complainant's image by the Respondents' employees, servants, and/or agents, without their prior knowledge and consent, has exposed them to unwarranted public attention and resulted in a gross violation of the Complainant's right to privacy as enshrined under Article 31 (c) of the Constitution of Kenya.

17. It is the Complainant's position that as a result of the Respondent and their employees, servants, and/or agents' unlawful actions, the Complainant has suffered significant distress, emotional suffering, and reputational harm due to a breach of their privacy. The use of the Complainant's photograph and video was not only unlawful but exploitative. He states that the Respondent now stands in a position of benefitting monetarily and increasing its customer base by use of the said images. According to the Complainant, the Respondent in its caption targeted about 6 Parties which consolidate individual birthdays, family

weddings, bride price customary functions, corporate end of year parties, etc. The Complainant states that none of this benefit shall be remitted to the Complainant and none has been consented as such.

18. The Complainant further provided names of persons alleged to have raised concerns to him, noting that they first hold the Complainant liable for having their images taken at their wedding and later shared by the Respondent.

19. The Complainant stated that his advocates served a demand letter dated 3<sup>rd</sup> October 2024 on an even date but the Respondent not only refused to accept receipt, acknowledge receipt nor remove the said materials from their media platforms. The Complainant maintained that by so refusing, the door for removal of the said materials from the two media platforms has not transpired, the door for negotiations has been shut, no apology has been tendered and marketing of the Respondent continues to persist.

20. In support of his complaint, the Complainant adduced the following –

- Screenshots of the Respondent's Facebook post; and
- A copy of a Demand Letter from the Complainant's Advocate to the Respondent.

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

21. The Respondent did not respond to the notification of complaint dated 9<sup>th</sup> December 2024 from this Office. The allegations in the complaint remain uncontroverted.

## **F. ISSUES FOR DETERMINATION**

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

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

**I. WHETHER THE RESPONDENT VIOLATED THE COMPLAINANT'S RIGHTS UNDER THE ACT AND ATTENDANT REGULATIONS**

23. In the demand letter dated 3<sup>rd</sup> October, 2024, the Complainant sought, among others, removal of any posts, videos, images and promotion featuring the Complainant's photo and video within seven (7) days from the date of the letter.

24. In so doing, the Complainant was exercising his right to erasure of his personal data.

25. Section 40(1)(b) of the Act provides for the right of erasure and states that, "*a data subject may request a data controller or data processor to erase or destroy without undue delay personal data that the data controller or data processor is no longer authorized to retain, irrelevant, excessive or obtained unlawfully.*"

26. By dint of Regulation 12 (3) of the Data Protection (General) Regulations, 2021, the Respondent was required to respond to the request for erasure within fourteen days of the request.

27. The Respondent failed and/or neglected to respond to the Complainant's demand letter dated 3<sup>rd</sup> October, 2024, neither did they respond to the Notification letter issued to it by this Office.

28. As at the date of this determination, the Complainant's image and video are still available on the Respondent's Facebook and Instagram accounts, in violation of the Complainant's right to erasure.

29. Consequently, this Office therefore finds that the Respondent has violated the Complainant's right to erasure under Section 40(1)(b) of the Act.

**II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT AND THE ATTENDANT REGULATIONS**

30. 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;

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- 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.

31. The Respondent had a duty to notify the Complainant of his rights under the Act, the fact that it had collected his images and videos and was going to use it to advertise on Facebook and Instagram, and the measures it has in place to ensure safety of her personal data.

32. The Respondent failed to fulfil this obligation under Section 29 of the Act.

33. In addition, Section 37(1) of the Act states 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."*

34. 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. No evidence was presented to this Office to demonstrate that the Complainant had consented to the use of his image and video by the Respondent.

35. Regulation 14(1) of the Data Protection (General Regulations) 2021, 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."*

36. The publishing of the Complainant's photograph on the Respondent's Facebook and Instagram advanced its commercial interests as it used the Complainant's

image to market its services to the general public. Indeed, the posts were accompanied by the following messaging –

*"#FinalQuarterOf2024 Are you planning an event? Wedding, Ruracio, Birthday Parties, Engagement Parties, Retirement Parties, Anniversary, Office End Year Parties, or any other form of PARTY at Hotel Tobriana you will get a personalized quote just for you that fits your budget Ridgeways-Jacaranda Close. Contact 07xxxxxxx0 for bookings."*

37. The actions of the Respondent amount to use of personal data for commercial purposes without obtaining express consent from the Complainant. The Respondent ought to have sought and obtained consent from the Complainant before uploading his image and videos on its Facebook and Instagram.

38. From the foregoing, this Office finds that the Respondent failed to fulfil its obligations by failing to fulfil their duty to notify the Complainant under Section 29 of the Act and for using the Complainant's personal data for commercial purposes without obtaining his express consent contrary to Section 37(1) of the Act.

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

39. 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.

40. The Complainant prayed for the removal of the said videos and images from the Respondent's Facebook and Instagram, an official apology by the Respondent and Compensation of Kshs. 2.5 Million noting the damage to the complainant, his wife and child.

41. This Office hereby **directs the Respondent to erase the Complainant's personal data, including his images and videos, from its Facebook and Instagram accounts within fourteen days of service of this determination.**

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42. An apology is not one of the remedies provided for in Regulation 14(3) of the Enforcement Regulations and therefore the above prayer is declined.
43. Section 65 of the Act provides for compensation to data subjects and states, "*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.*"
44. Section 65(4) of the Act states that, "*damage includes financial loss and damage not involving financial loss, including distress.*"
45. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
46. Notably, the Complainant did not establish that he had the authority to lodge this complaint and make a request for damages on behalf of any other person. The Office shall therefore only consider Complainant's claim for compensation.
47. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's personal data was used for commercial purposes without obtaining his consent. Further, the Office considers the fact that the Respondent declined and/or neglected to pull down the Complainant's image from its Facebook and Instagram after the Complainant exercised his right of erasure and that the same are still available online as at the date of this determination.
48. Consequently, the Office hereby **orders the Respondent to pay the Complainant Kenya Shillings Seven Hundred and Fifty Thousand (KES. 750,000)** as compensation for the use of his personal data for commercial purposes without obtaining express consent and violation of his right to erasure.

#### **G. FINAL DETERMINATION**

49. The Data Commissioner therefore makes the following final determination:
- i. The Respondent is found liable for violating the Complainant's right of erasure, failing to fulfil its duty to notify and using of the Complainant's personal data for commercial purposes without obtaining his express consent.

- ii. The Respondent is directed to erase the Complainant's personal data, including his images and videos, from its Facebook and Instagram accounts within fourteen days of service of this determination.
- iii. The Respondent is hereby ordered **to pay the Complainant Kenya Shillings Seven Hundred and Fifty Thousand (KES. 750,000) as compensation.**
- iv. An enforcement notice to issue to the Respondent.
- v. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

**DATED** at **NAIROBI** this 22<sup>nd</sup> day of January 2025.



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**IMMACULATE KASSAIT, MBS  
DATA COMMISSIONER**