



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1655 OF 2024

ANTONY MWENDA.....COMPLAINANT

-VERSUS-

CERES TECH LIMITED T/A ROCKETPESA.....RESPONDENT

DETERMINATION

(Pursuant to Section 8(1)(f) and 56 of the Data Protection Act, 2019 and Regulation 14 of the Data Protection (Complaint Handling Procedure and Enforcement) Regulations, 2021)

A. INTRODUCTION

1. The Office received a restituted complaint on 18th October 2024 from the Complainant. The complaint relates to the alleged contacting of the Complainant by the Respondent demanding payment of a loan that he was not a party to.

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

xl

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 (Complaint 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. The Office received the initial complaint from the Complainant on 7th June 2024. On 3rd September 2024, the Office discontinued the complaint and communicated to the parties in writing. Regulation 7(3) of the Enforcement Regulations provides for restitution of a discontinued complaint and states that, "*a Complainant may, where a complaint has been discontinued pursuant to these Regulations, re-institute a complaint upon providing grounds for the restitution to the Data Commissioner.*"
7. The Complainant reinstated the discontinued complaint on 18th October 2024 and produced additional evidence relevant to the matter. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainant who was an aggrieved data subject.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 19th December 2024 and referenced ODPC/CONF/1/5 VOL 1 (378). In the Notification of the Complaint, the Respondent was informed that if the allegations by the Complainant were true,

28

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. Any relevant material or evidence in support of its response;
 - c. Details on how it obtained the Complainant's personal data;
 - d. The contractual agreement it had with the Complainant;
 - e. Whether the Complainant was notified and gave express consent for the use of his personal data;
 - 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 relevant information it wishes the Office to consider.
9. The Respondent was non-responsive and did not submit a response to the Notification of Complaint. Regulation 11(2) of the Enforcement Regulations states that, *"where a respondent does not take any action as contemplated in the notification of complaint, the Data Commissioner shall proceed to determine the complaint in accordance with the Act and the Enforcement Regulations."*
10. 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

11. The complaint relates to the alleged contacting of the Complainant by the Respondent demanding payment of a loan that he was not a party to.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

12. The Complainant alleged that on the 14th of November 2023, he received a message *via* WhatsApp informing him that he had a loan from the Respondent. He provided screenshots of the WhatsApp messages as proof.

13. The Complainant stated that he informed the Respondent that he never borrowed the alleged loan. However, the Respondent insisted that the Complainant had taken a loan with it using the mobile number 0727****34 and ID Number 31****75. The Complainant stated that the above mobile number was not his but the Identification number was his.
14. The Complainant stated that he informed the Respondent that this was a case of fraud but the Respondent still threatened him to pay the loan and later called him again using a different mobile number.
15. The Complainant stated that he reported the matter to Central Police Station where he submitted his evidence to an investigation officer.
16. Further, the Complainant asserted that the Respondent had provided false and misleading information to the Data Commissioner in the initial complaint contrary to Section 61 of the Act.
17. The Complainant stated that he reported the matter to the Directorate of Criminal Investigations Cybercrime unit who conducted investigations into the allegations of fraud which led to the owner of mobile phone number 0727****34 that had been used to obtain the alleged loan being arrested.
18. Upon interrogation, the owner of the aforesaid mobile number confessed that he indeed had received a loan from the Respondent and that he had settled the loan. He voluntarily provided his Mpesa statements as proof that he had obtained a loan from the Respondent and settled the same.
19. The Complainant averred that the Mpesa statement provided corroborated with his statement as the records show that on 15th November, 2023, KSH 8000 was sent to Ceres Tech Limited 1 ACC Rocketpesa at 12:27:57 via paybill no 4096615.

ii. THE RESPONDENT'S RESPONSE

20. The Respondent did not submit a response to the restituted Complaint. However, it responded to the Notification of the initial complaint *via* a letter dated 17th June 2024.

21. In the said response dated 17th June 2024, the Respondent stated that neither the numbers 0727****34 and 0708****61 nor the ID number 31****75 appear in its database.

22. The Respondent also noted that upon doing a preliminary review in their loan database nothing showed any records associated with the Complainant, including his ID, name and telephone number.

23. The Respondent averred that it had reviewed and examined the number which contacted the Complainant *via* WhatsApp and the said mobile number was neither associated with the company nor any of its authorized agents.

F. INVESTIGATIONS UNDERTAKEN

24. The Office analyzed the Complaint as lodged and the supporting evidence including the certified Mpesa Statements of the Respondent's customer that had allegedly taken a loan using mobile number 0727****34 and found that KES 8,040/= had been paid to the Respondent's Paybill on 15th November 2023, confirming that he had indeed taken a loan with the Respondent.

G. ISSUES FOR DETERMINATION

25. 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

26. The Complainant alleged that he has been receiving WhatsApp messages and calls regarding a loan that he is not a party to and that his National Identification number had been linked to a loan that he had not obtained.

27. 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. The Respondent collected the mobile phone number and National Identification Number of the Complainant from a third party and did not inform him that his personal data was being collected. The Respondent did not also inform the Complainant that his National Identification Card details were collected for the purpose of disbursement of a loan to its customer.
28. 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 his right to be informed.
29. Section 26(c) of the Act provides for the right to object to processing of personal data. The Complainant objected to the processing of his personal data *via* WhatsApp messages sent to the Respondent and/or its agent.
30. The Respondent ought to have complied with the Complainant's request and stopped contacting the Complainant, demanding for payment of a loan that he did not apply for or obtain. The Respondent intentionally and/or negligently ignored the Complainant's objection and continued contacting him even after he had objected to the processing of his personal data.
31. From the foregoing, this Office finds that the Respondent violated the Complainant's right to be informed and his right to object to the processing of his personal data.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

32. The Respondent had an obligation under Section 25 of the Act to ensure that the Complainant's personal data is, amongst others: -
- i. processed in accordance with his right to privacy;
 - ii. processed lawfully, fairly and in a transparent manner in relation to the data subject;

- iii. collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes; and
- iv. collected only where a valid explanation is provided whenever information relating to private affairs is required.

33. The Respondent failed to take reasonable steps to ensure that the National Identification Card Number attached to the loan was accurate and reliable. The Respondent ought to have verified that the National Identification Number attached or associated with the loan actually belonged to the individual taking the loan and not a third party (the Complainant).

34. In collecting personal data, the Respondent is mandated by Section 28(1) of the Act to collect the data directly from the data subject. Section 28(2) sets out instances where personal data may be collected indirectly. The Respondent collected the Complainant's mobile phone number and National Identification Card Number from a third party and did not demonstrate that any of the conditions set out in Section 28(2) were applicable in this matter. The failure to collect the Complainant's personal data directly from him exposed him to financial fraud as he was associated with a loan that he neither applied for nor obtained.

35. Further, 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. the third parties whose personal data has been or will be transferred to, including details of the safeguards adopted; and
- v. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

36. The Respondent had a duty to notify the Complainant of his rights under the Act, the fact that his mobile phone number and National Identification Number was

being collected for purposes of disbursement of a loan, and the measures it had in place to ensure the safety of his personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

37. Section 30 of the Act provides for lawful processing of personal data and lists down the lawful bases for processing personal data. The Respondent did not demonstrate the lawful basis relied on to process the Complainant's personal data and therefore processed his data unlawfully.

38. From the above, this Office finds that the Respondent did not fulfil their obligations provided for under 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 to be compensated Kshs 3,000,000/=.

41. 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.*"

42. Section 65(4) of the Act states that, "*damage includes financial loss and damage not involving financial loss, including distress.*"

43. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

44. In considering whether to issue compensation, this Office takes into consideration the fact that the Respondent unlawfully processed the Complainant's personal data and intentionally or negligently violated the Complainant's right to be informed and his right to object to the processing of his personal data.

45. The Office declines to award the Complainant Kenya Shillings three million as prayed for. **The Office hereby orders the Respondent to pay the**

Complainant Kenya Shillings Seven Hundred Thousand (KES. 700,000/=) as compensation for the unlawful processing of his personal data and for violation of his right to be informed of the use to which his personal data is to be put and his right to object to the processing of his personal data.

46. Section 61 of the Act provides for the offence of obstruction of the Data Commissioner and states that, *"a person who, in relation to the exercise of a power conferred by Section 9 – gives to the Data Commissioner any information which is false or misleading in any material aspect, commits an offence and is liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years, or to both."*

47. The Respondent intentionally provided false and misleading information to this Office via a letter dated 17th June 2024, in response to the initial complaint. The Respondent knowingly submitted false and misleading information to wit,

*"a preliminary review of our loan data does not show any records associated with the Complainant, including his ID number, name and telephone number... Neither the numbers 0727****34 and 0708****61 nor the ID number 31****75 appear in our database... Our company does not engage in unauthorized data collection practices."*

48. MPesa statements obtained from the Loanee operating mobile phone number 0727****34 reveal that a payment of KES 8,040/= was made to the Respondent, thereby confirming that he had obtained a loan from the Company. Furthermore, it is evident that the loan records associated with the loanee and the Complainant were deliberately erased from the Respondent's database in order to derail investigations and subvert justice.

49. From the above, **a recommendation for prosecution is hereby made to the Director(s) of the Respondent's Company**, for obstruction of the Data Commissioner in exercise of their powers and giving the Data Commissioner information which is false and misleading in any material aspect, pursuant to Sections 61(a) & (d) of the Act.

H. FINAL DETERMINATION

50. The Data Commissioner therefore makes the following final determination: -

- i. The Respondent is hereby found liable for violating the Complainant's right to be informed of the use to which his personal data was to be put, his right to object to the processing of his personal data, and for unlawfully processing the Complainant's personal data.
- ii. A recommendation for prosecution is hereby made to the Director of the Respondent's Company, for obstruction of the Data Commissioner in exercise of their powers and giving the Data Commissioner information which is false and misleading in any material aspect, pursuant to Sections 61(a) & (d) of the Act.
- iii. An enforcement notice to hereby be issued to the Respondent.
- iv. The Respondent is hereby ordered to pay the Complainant **Kenya Shillings Seven Hundred thousand (KES 700,000)** as compensation.
- v. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 15th day of January 2025.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER