



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1764 OF 2024

FRIDAH KEMUNTO OBUBA.....COMPLAINANT

-VERSUS-

WHITEPATH COMPANY LIMITED.....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 Complainant lodged a complaint on 6th November, 2024, alleging that she received unsolicited communications from the Respondent, urging her to inform a loanee to clear a loan owed to 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 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 (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. This Office received a complaint from the Complainant on 6th November, 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by 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 9th December, 2024 and referenced ODPC/CONF/1/5 VOL II (303). 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;
 - b. Any relevant material or evidence in support of its response;
 - c. The lawful basis relied upon to process the Complainant's personal data;
 - d. Evidence as to whether the Complainant consented to the processing of her personal data;

- e. 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
 - f. Any other relevant information it wishes the Office to consider.
8. 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."*
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 contacting of the Complainant by the Respondent, urging her to inform the Respondent's customer to clear a loan owed to the Respondent.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant alleged that she received an SMS from 075*****18 regarding a loan taken by one Mr. O**** J***** Y*** and she was concerned whether her details were shared with the Respondent as an alternative number or a guarantor. She provided screenshots of the messages received as proof.
12. The Complainant stated that, upon probing Mr. O**** J**** Y***, he indicated that he didn't provide any of her details to the Respondent during the loan application process.
13. The Complainant further stated that she made a call to the same number to ascertain who the sender was and a very rude lady answered the call and confirmed the SMS was from the Respondent's Company. Minutes after the phone

call, the Respondent's agent sent another SMS with the same request about a loan she knew nothing about.

14. The Complainant stated that she strongly believes that her privacy and security have been compromised. She further stated that she often shares sensitive and private information with Mr. O**** J***** Y*** and such should not be accessible to third parties unless the Respondent's App has spyware. Additionally, this issue has caused significant concern regarding the security of her personal data, including but not limited to her banking and financial details.

15. Furthermore, it has led to consideration of changing her financial details in case her details have been used in any illegal activities. This action by the Respondent is really slowing down her business.

16. The Complainant sought the following remedies:

- a) A formal apology from the Respondent.
- b) The Respondent to immediately stop contacting her.
- c) Financial compensation.
- d) The Respondent to face severe consequences like license suspension and/or fine.

ii. THE RESPONDENT'S RESPONSE

17. The Respondent was non-responsive and did not submit a response to the Notification of Complaint. Therefore, the allegations made in the Complaint remain uncontroverted.

F. INVESTIGATIONS UNDERTAKEN

18. The Office analyzed the Complaint as lodged and the supporting evidence.

19. The Office established that the Complainant received messages from the Respondent urging her to inform its customer to clear his overdue loans.

20. The Office also established that the Complainant did not take a loan from the Respondent or consent to be listed as an alternative contact person and/or a guarantor.

G. ISSUES FOR DETERMINATION

21. 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

22. 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 Complainant's mobile phone number unlawfully by accessing its customer's phone book and did not inform her that her personal data was being collected. The Respondent did not also inform the Complainant that her mobile phone number was being collected for the purpose of being listed as an alternative contact person, in case it is unable to contact its customer regarding a loan.

23. The Respondent, by not informing the Complainant of the use to which her personal data was to be put, at the point of collection of the personal data, violated her right to be informed.

24. From the foregoing, this Office finds that the Respondent violated the Complainant's right to be informed of the use to which her personal data was to be put.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

25. 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 her 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.

26. 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 unlawfully by accessing its customer's phone book, and did not demonstrate that any of the conditions set out in Section 28(2) were applicable in this matter.

27. 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.

28. The Respondent had a duty to notify the Complainant of her rights under the Act, the fact that her mobile phone number was being collected for purposes of being listed as an alternative contact person, and the measures it had in place to ensure the safety of her personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

29. 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 her personal data unlawfully.

30. From the above, this Office finds that the Respondent did not fulfil its obligations provided for under the Act.

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

31. 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.

32. The Complainant prayed for an order directing the Respondent to stop contacting her. **The Respondent is hereby ordered to immediately stop contacting the Complainant regarding the said loan that she was not a party to.**

33. The Complainant also prayed for compensation from the Respondent.

34. 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.*"

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

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

37. 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 of the use to which her personal data was to be put. **The Office hereby orders the Respondent to pay the Complainant Kenya Shillings four hundred and fifty thousand (KES. 450,000/=) as compensation** for the unlawful processing of her personal data and for violation of her right to be informed of the use to which her personal data was to be put.

H. FINAL DETERMINATION

38. 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 her personal data was to be put and for unlawfully processing the Complainant's personal data.
- ii. An enforcement notice to hereby be issued to the Respondent.
- iii. The Respondent is hereby ordered to pay the Complainant **Kenya Shillings four hundred and fifty thousand (KES 450,000)** as compensation.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 29th day of January 2025.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**