



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1618 OF 2024

LAWRENCE M'IMPWI KIRIMA.....COMPLAINANT

-VERSUS-

SOLAR PANDA COMPANY KENYA 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 alleged that the Respondent has been using the Complainant's personal data in the form of an image for commercial gain to advertise its products without the Complainant's express consent and knowledge.

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 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 15th October 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 *via* a letter dated 11th November 2024, referenced ODPC/CONF/1/5 VOL II (293), and served upon it on 12 November 2024.
8. 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 it by the Complainant;
 - b) Any relevant materials or evidence in support of its response;
 - c) The contractual agreement with the Complainant;
 - d) Whether the Complainant was notified and expressly consented to the use of his image for commercial purposes;
 - e) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;

f) Any other information you wish the Office to consider.

9. The respondent acknowledged and responded to the Notification letter on 2nd December 2024.

D. NATURE OF THE COMPLAINT

10. The Complainant alleged that the Respondent, without his consent or any other lawful basis thereof, collected, processed and used his image without his consent for marketing and commercial purposes. The Complainant alleged that the Respondent had used his image in its sales marketing fliers without express consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

11. The Complainant alleges that sometime in 2022, he became aware that the Respondent company was using his image to market and advertise its products without his consent.

12. He made efforts in trying to inquire with the Respondent's officials as to why his image was used without his consent to no avail.

13. As evidence, among others, the Complainant adduced copies of the impugned marketing fliers and email correspondences between him and the Respondent's representative inquiring about the use of his image.

i. THE RESPONDENT'S RESPONSE

14. The Respondent in its statement of response stated that the Complainant was a field agent who conducted sales for the Company and would earn commissions on agreed terms and conditions.

15. The Respondent posited that when the Complainant's photo was taken as a field agent, it placed it in a library and it was pulled/ retrieved solely for the legitimate purpose of improving the visibility of the field agents. They stated that when they entered into a field agent agreement in July, 2019, the Act had yet to be enacted.

16. The Respondent also stated that the flier in question came into question in 2022 in which case the Complainant made sales only in December 2022 and January 2023.
17. The Respondent further contended that after the Act was enacted, it revised its procedures, adopting a photo consent form for collecting and processing the images. The Respondent stated that they also revised the field agreements to provide the basis for collecting and processing the images for purposes of improving the visibility of the field agents.
18. The Respondent stated that in as much as it reviewed its employees' contracts when the Act was enacted, the Complainant's contract of employment was not reviewed because, during the period of review, the Complainant was no longer making sales for the Respondent.
19. According to the Respondent, sometime in June 2022, its CEO received an email from the Complainant requesting funds in the form of an indemnity to compensate him for the use of his photo in the company's flyers.
20. That considering the reason for the request, the company CEO consulted the Complainant's sales and commission history and offered the Complainant compensation who was to provide his mobile phone number for the proposed compensation to be remitted to him.
21. The Respondent also stated that, at all times, and based on the Complainant's request, the parties understood that the compensation would be for improving sales that the Complainant had not made for a while at the time of sending the email.
22. The Respondent further posited that it has since stopped the printing of flyers that bear the Complainant's image.
23. As part of its evidence, the Respondent adduced (a) a field agent agreement between the Complainant and the Respondent; (b) the Complainant's commission history; (c) the Respondent company's Organogram; (d) the Respondent's Human Resource Manual; (e) Flyers to demonstrated the images currently in use;

(f) Revised agreements currently in use with the field agents; (g) photo consent form; and (h) its data protection policy.

F. ISSUES FOR DETERMINATION

24. It is undisputed that: -

- a) At all material times when the Complainant's photograph was taken by the Respondent, the Complainant was the Respondent's sales agent. The Complainant's image was taken when the Complainant was the Respondent's employee.
- b) The Respondent used the Complainant's image/ photograph commercially, in its product marketing fliers.

25. In light of the above, the complaint, the Respondent's responses and evidence adduced, 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

26. 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.

27. Section 37 (1) of the Act provides for the 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 authorized 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."

28. 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.

29. As stated earlier herein, it is undisputed that the Respondent used the Complainant's image/ photograph in its product marketing fliers.

30. The Respondent was thus required to obtain the Complainant's express consent for the commercial use of his image.

31. 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.

32. 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 Supplied]

33. Further Regulation 4 of the Data Protection (General) Regulations, 2021 expounds on processing on the basis of consent as follows:-

4. Processing on the basis of consent

(1) where processing is based on consent in accordance with section 32 of the Act, a data controller or data processor shall, in seeking consent prior to the processing, inform the data subject of-

- (a) the identity of the data controller or data processor;*
- (b) the purpose of each of the processing operations for which consent is sought;*
- (c) the type of personal data that is collected and used;*
- (d) information about the use of the personal data for automated decision-making, where relevant;*
- (e) the possible risks of data transfers due to absence of an adequacy decision or appropriate safeguards;*
- (f) whether the personal data processed shall be shared with third parties;*
- (g) the right to withdraw consent; and*
- (h) the implications of providing, withholding or withdrawing consent.*

(2) The information under sub-regulation (1) may be presented to the data subject through a written notice, oral statement, audio or video message.

(3) In obtaining consent from a data subject, a data controller or a data processor shall ensure that the—

- (a) data subject has capacity to give consent;*
- (b) data subject voluntarily gives consent; and*
- (c) consent is specific to the purpose of processing.*

(4) Pursuant to section 32(4) of the Act, consent shall be considered to have been given freely, unless where —

- (a) it is presumed on the basis that the data subject did not object to a proposal to processing of their personal data in a particular manner;*
- (b) it is presented as a non-negotiable part of the terms and conditions for processing;*
- (c) the data subject is unable to refuse or withdraw their consent without*

detriment;

(d) the data controller or data processor merges several purposes for processing without seeking specific consent for each purpose; or

(e) the intention of the data subject is ambiguous.

(5) Where the data subject withdraws consent to any part of the processing, the data controller or data processor shall restrict the part of the processing in respect of which consent is withdrawn, subject to section 34 of the Act.

34. In a nutshell, the above legal provisions provide the legal requirements that data controllers and processors should abide by when it comes to relying on consent as a lawful basis for processing of personal data.

35. Noting that the burden of proof of consent lies on the Respondent as stated above in Section 32(1) of the Act, the Office has reviewed the evidence adduced by the Respondent to establish whether the Complainant gave his consent for the use of his image in the year 2022.

36. From our interrogation we could not find any manner/ form of consent by the Complainant for the Respondent to use his personal data for commercial purposes. The produced agreement between the two parties is akin to an employment contract. Nothing in the agreement showed that the Complainant consented to the use of his personal data for commercial purposes. This corresponds with the Respondent's admission that the Complainant's sale agreement was not updated and/or revised when other sale agents agreements were revised to incorporate the aspect of data protection and consent.

37. That being said, it therefore follows that the Respondent has not discharged 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.

38. This Office therefore finds and determines that the Respondent did not obtain the requisite consent required by the Act to process the Complainant's image for commercial purposes.

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

39. 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.
40. Having considered the merits of the Complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent used the Complainant's data without express consent, it, therefore, follows that there has been a violation of the Act by the Respondent.
41. Section 65 (1) of the Act provides for compensation to a data subject and states that a person who suffers damage because 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.
42. 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.
43. The Complainant claimed for the remedy of compensation for the damage incurred due to the Respondent's gross violation. The Respondent on its part contended that the compensation amount claimed by the Complainant is excessive and that the nature of the complaint does not warrant compensation as a remedy.
44. Having found that the Respondent violated the Complainant's rights and that it processed the Complainant's personal data for commercial use without his consent thereby gaining financially directly and indirectly, the Respondent is hereby directed to compensate the Complainant the amount of **KES. 500,000/= (Five Hundred Thousand Shillings Only)** for use of the Complainant's image for commercial purposes without his consent.

I. FINAL DETERMINATION

45. In the ultimate, the Data Commissioner makes the following final determination;

- i. The Respondent is hereby found liable.
- ii. The Respondent to pay the Complainant a sum of **KES. 500,000/= (Five Hundred Thousand Shillings Only)** as compensation.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 12th day of January 2025



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

