



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0085 OF 2025

CHIZZY TAABU ORWA.....1ST COMPLAINANT

SHELMITH NYAWIRA GITONGA.....2ND COMPLAINANT

STANLEY KINYUA WACHIRA.....3RD COMPLAINANT

-VERSUS-

MAST-JAGERMEISTER SE.....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 Office received a complaint from the Complainants alleging that the Respondent used their images in their promotional campaign without their consent, thereby violating their right to privacy.

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 Complainants' advocates on 22nd January 2025. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainants on behalf of 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 17th February 2025 and referenced ODPC/CIE/CON/2/1(076). 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 name and contact details of a representative who can provide further information regarding this complaint;
 - b) Any relevant materials or evidence supporting the response;
 - c) Evidence, if any, that the Complainants consented to the use of their images in the *Jägermeister Feierstarter 2024/2025 – The Global Team of Student Ambassadors* campaign.

- d) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainants, if any;
 - e) The mitigation measures taken or planned to prevent a recurrence of such incidents in the future.
 - f) Any other relevant information you wish this Office to consider.
8. The Respondent responded to the said notification *via* a letter dated 10th March 2025.

D. NATURE OF THE COMPLAINT

9. The Complaint relates to the alleged use by the Respondent of the Complainants' images in its promotional campaign without the Complainants' consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

10. The Complainants lodged the complaint through their advocates pursuant to Regulation 4 (3) of the Enforcement Regulations which state that a complaint may be lodged by a person acting on behalf of the Complainant.
11. The Complainants alleged that on or about the 18th of September 2024, they became aware that the Respondent, without their consent and/ or authority, used their images and likeness for commercial gain when it ran a promotional campaign by the name "JAGERMEISTER FEIERSTARTER 2024/2025 THE GLOBAL TEAM OF STUDENT AMBASSADORS. The promotion was run to promote the Respondent's brand.
12. The Complainants contended that the images/photographs were also displayed on the Respondent's official website under the headline "*Sampling ice cold shots*" and as a result, the Complainants have been viewed as promoting and advocating for the drinking of alcohol by campus students, which position is untrue. This has caused ridicule to the Complainants by persons known to them.
13. The Complainants further stated that distressed by the alleged pendent situation, they approached their advocate who issued a demand notice to the

Respondent. The Complainants stated that the Respondent responded to their advocates demand letter admitting the use of the said images but did not remedy the issue at hand.

14. The Complainants also stated that in the response to their advocates demand, the Respondent stated that an implied consent was issued by the Complainants at an event in Kiambu.

15. The Complainants contended that their images were taken in some tavern in Kitengela, in which consent was not given for the same to be distributed or shared for personal or commercial purposes/gain.

16. The Complainants' adduced copies of their identification cards and images as evidence.

ii. THE RESPONDENT'S RESPONSE

17. The Respondent in its response dated 10th March 2025 contended that the photograph submitted by the Complainants as evidence depicts only two (2) identifiable individuals.

18. The Respondent further stated that the adduced photograph showcases a partial image obscuring the facial details of the second individual from the left. To the Respondent, the obscured individual cannot be identified. The Respondent urged this office to dismiss the Complaint brought by the obscured Complainant, stating that the claim is unfounded.

19. The Respondent contended that in all of its events they prominently position disclaimer notices (in English and Swahili language) as large-sized notice boards to inform natural persons at the event that their pictures may be taken.

20. The Respondent further contended that despite displaying the disclaimer notices, and in acceptance of the condition set out in the notice about taking photographs if one chose to enter the event premises, the Complainants voluntarily chose to enter one of the events and pose for pictures while engaging directly with the camera, indicating their awareness to be photographed in that context.

21. The Respondent stated that they were running a campaign to kick off their brand ambassador campaign, and the participants were to apply to be considered as brand ambassadors. To participate, the Respondent stated that it created a landing page that was available for a short time for the application process. The Respondent further stated that the landing page was not publicly available but was restricted to just those consumers who chose to apply for the chance to become a brand ambassador.

22. The Respondent further stated that Upon completion of the campaign, they promptly took down all photographs and permanently deleted the photographs from their servers.

F. ISSUES FOR DETERMINATION

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

- i. Whether the Complainants' images constitute personal data as per the Act;
- ii. Whether the Respondent obtained express consent from the Complainants to process their personal data for commercial purposes; and
- iii. Whether the Complainants are entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE COMPLAINANTS' IMAGES CONSTITUTE PERSONAL DATA AS PER THE ACT

24. The Act defines personal data to mean *any information relating to an identified or identifiable natural person*. It goes further to define an identifiable natural person as a person who can be identified directly or indirectly by reference to a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social or social identity.

25. It was the Respondent's position that one of the Complainants, the second from the left of the impugned promotional photo, was obscured and or anonymized and

hence the individual could not be identified. As such, the Respondent contended that the Complaint brought by the obscured individual should be dismissed as the same does not fall within the mandate of this office.

26. We have had a chance to interrogate the impugned promotional image and the evidence adduced before this office. A thorough look at the evidence adduced shows that the obscured individual is not one of the complainants herein. The complainants herein are the two ladies and a gentleman who can be identified from the impugned promotional image.

27. This Office therefore finds that as far as issue no (i) is concerned, the complainants herein are identifiable natural persons and their images constitute personal data as envisaged under the Act.

II. WHETHER THE RESPONDENT OBTAINED EXPRESS CONSENT FROM THE COMPLAINANTS TO PROCESS THE MINOR'S PERSONAL DATA FOR COMMERCIAL PURPOSES.

28. The Black's Law Dictionary, 10th Edition, defines consent as "agreement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person.

29. 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.

30. The definition of the Act details the minimum criteria for consent to be that it must be certain that the individual has consented, and what they have consented to. This certainty requires more than just a confirmation that they have read and understood the terms and conditions. There must be a clear signal that they agree or have agreed to the processing. The unambiguity of the consent further links in with the requirement that consent must be verifiable to the extent that one must be able to demonstrate that the data subject consented to processing of their personal data.

31. 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.

32. The Act goes further to state the conditions of consent. It states as follows with regard to 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 ours)

33. On the issue of commercial use of personal data, the Act provides under Section 37 (1) (a) 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. Regulation 14 (1) of the General Regulations 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.

35. The Complainants adduced evidence to demonstrate that the Respondent used their images to promote the Respondent's product brand thereby the same falls under commercial purpose under the Act.

36. From the evidence adduced to this Office, it is evident that at all material times when the Respondent was handling the Complainants' data, it required the Complainants' express consent.

37. In its Response dated 10th March 2025, the Respondent stated that the Complainants had impliedly given their consent by choosing to enter into the areas that it had displayed the disclaimer notices and posing for pictures while engaging directly with the camera. These assertions by the Respondent are misconstrued. The disclaimer notices do not constitute anything further than just notices. They do not constitute express consent when it comes to processing for commercial purposes as envisaged by the Act. As such, the Respondent did not discharge its burden of proof as envisaged under Section 32 (1) of the Act.

38. In view of the foregoing, the Office reiterates that the disclaimer notices displayed on large-sized notice boards in events does not constitute express consent with regards to processing of personal data for commercial purposes under the Act and attendant Regulations.

39. This Office therefore finds that as far as issue no (ii) is concerned, the Respondent did not obtain express consent from the Complainants to process their personal data for commercial purposes.

III. WHETHER THE COMPLAINANTS ARE ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS.

40. Under 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.

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41. Having considered the merits of the Complaint, the evidence adduced by the Complainants and the Respondent, and having found that the Respondent processed the Complainants' personal data without consent, it therefore, follows that there has been a violation of the Act by the Respondent to that extent. The Respondent did not process the Complainant's personal data in accordance with Sections 30 (1) (a) and 32 (1) of the Act.
42. Section 65 (1) of the Act provides for compensation to a data subject and states 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. Section 65 (4) of the Act states that "damage" includes financial loss and damage not involving financial loss, including distress.
43. 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.
44. The Complainants claimed for compensation as a remedy against the Respondent. The Respondent did not provide a response to this prayer.
45. Having found that the Respondent processed the Complainants' personal data without obtaining their consent, the Respondent is hereby directed to compensate the Complainants the amount of **KES 1,500,000/= (One Million Five Hundred Thousand Shillings Only)** for processing of the Complainants' personal data for commercial purposes without their express consent constituted as follows:
- i. Chizzy Taabu Orwa- KES 500,000 (Five Hundred Thousand Shillings Only)
 - ii. Shelmith Nyawira Gitonga-KES 500,000 (Five Hundred Thousand Shillings Only)
 - iii. Stanley Kinyua Wachira- KES 500,000 (Five Hundred Thousand Shillings Only)

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for use of the Complainants' personal data for commercial purposes without express consent.
- ii. The Respondent is hereby ordered to compensate the Complainants **KES 1,500,000 (One Million Five Hundred Thousand Kenya Shillings Only)**
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 16th day of April 2025.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**