



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 1548 OF 2024**

**CINDERELLA OYUKE.....COMPLAINANT**

**-VERSUS-**

**CAPSTUDIO KE.....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 4<sup>th</sup> October, 2024 alleging that the Respondent has been using her pictures on its social media platforms for over a year despite her objection.

**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 4<sup>th</sup> October, 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 5<sup>th</sup> November 2024 and referenced ODPC/CONF/1/5 VOL II(283). 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 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. The contractual agreement it had with the Complainant, if any;
  - 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. 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 use of the Complainant's photos for commercial purposes without obtaining her express consent.

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

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

11. The Complainant alleged that the Respondent has been using her pictures on its social media platforms for over a year, despite warning them severally not to do so. She produced screenshots of the said photos as proof.
12. She stated that she has tried to talk to the Respondent in person, through calls and texts but they stop for some days and then get back right to using her photos. She provided screenshots of messages sent to the Respondent as proof.
13. The Complainant further stated that she thought they had sorted out the issue last year but on 3<sup>rd</sup> October 2024, the Respondent on its WhatsApp status posted a picture of her advertising its service. Additionally, the Respondent also posted her picture on its Instagram page. She provided screenshots of the WhatsApp status and Instagram page as proof.

14. The Complainant stated that the Respondent is ruining her life and her mental health as she can't keep checking if her pictures are being used over and over, as the pictures were not meant for public consumption.

15. The Complainant sought the following remedies: -

- a) The Respondent to refrain from using her information and pictures.
- b) The Respondent to pay for the mental load and psychological torture it has taken her through.

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

16. 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**

17. The Office analysed the complaint as lodged and the supporting evidence.

18. The Office visited the Respondent's Instagram page by the name 'Capstudio Ke' and established that the Complainant's photo was uploaded there and was still available for viewing as of the date of this determination.

## **G. ISSUES FOR DETERMINATION**

19. 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. 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."*

27. In addition, Regulation 12(1)(b) of the Data Protection (General) Regulations, 2021 provides that a data subject may request a data controller or data processor to erase or destroy personal data held by the data controller or data processor where the data subject withdraws their consent that was the lawful basis for retaining the personal data.

28. The Complainant contacted the Respondent severally in a bid to have it stop using her photos, hence exercised her right of erasure of her personal data. Nevertheless, the Respondent ignored her erasure requests and the photos are still available for viewing at the Respondent's Instagram social media page.

29. The Respondent did not prove that it had any overriding legitimate interest to continue having the Complainant's photos on its Instagram page since she exercised her right of erasure.

30. From the foregoing, this Office finds that the Complainant's right of erasure was violated by the Respondent.

## **II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT**

31. The Respondent is a data controller within the definition of the Act and therefore has obligations pursuant to the Act.

20. 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. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

The Respondent had a duty to notify the Complainant of her rights under the Act, the fact that it had collected her photos and was going to use them for marketing purposes on Instagram and WhatsApp, and the measures it has in place to ensure safety of her personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

21. 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."***
22. 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.
23. The Respondent's act of posting the Complainant's photos on its Instagram and WhatsApp social media platforms was intended to attract clients to its studio, who would in turn pay for photography services offered by the Respondent. The Respondent stood to benefit commercially from the use of the Complainant's image.
24. 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. The Respondent was non-responsive and therefore did not prove that it obtained express consent to use the Complainant's photos on its social media platforms.
32. From the foregoing, this Office finds that the Respondent failed to fulfil its obligations under the Act.

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

33. 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.
34. The Complainant prayed for an order to be issued against the Respondent to refrain from using her information and pictures. **The Respondent is hereby ordered to stop publishing the Complainant's photos in its social media platforms and to erase the Complainant's photo(s) from all its social media platforms within the next seven (7) days, failure to which an enforcement notice shall issue.**
35. The Complainant also prayed for compensation for the mental and psychological torture suffered.
36. 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.*"
37. Section 65(4) of the Act states that, "*damage includes financial loss and damage not involving financial loss, including distress.*"
38. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
39. 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 her consent. Further, the Office considers the fact that the Respondent intentionally violated the Complainant's right of erasure of her personal data.
40. The Respondent is hereby **ordered to pay the Complainant Kenya Shillings five hundred thousand (KES. 500,000)** as compensation for the violation of the Complainant's right of erasure and for the use of the Complainant's personal data for commercial purposes without her express consent.

41. Pursuant to Regulation 14(2)(e), the Respondent is directed to put in place clear consent mechanisms and seek prior consent before publishing a data subject's photos on its social media page(s). The consent mechanism should also provide for withdrawal of consent and should be acted upon within the timelines stipulated under the Act and the Data Protection (General) Regulations, 2021.

#### H. FINAL DETERMINATION

42. The Data Commissioner therefore makes the following final determination:

- i. The Respondent is found liable for violating the Complainant's right of erasure of her personal data and for use of her personal data for commercial purposes without obtaining express consent.
- ii. The Respondent is hereby ordered to stop publishing the Complainant's photos in its social media platforms and to erase the Complainant's photo(s) from all its social media platforms within the next seven (7) days, failure to which an enforcement notice shall issue.
- iii. The Respondent is directed to put in place clear consent mechanisms and seek prior consent before publishing a data subject's image on its social media page(s).
- iv. The Respondent is hereby ordered **to pay the Complainant Kenya Shillings Five Hundred Thousand (KES. 500,000) 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 2<sup>nd</sup> day of January 2025.



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**IMMACULATE KASSAIT, MBS**  
**DATA COMMISSIONER**