



## OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0378 OF 2025

COMFORT MUTHONI GACHIRI.....COMPLAINANT

**-VERSUS-**

THE STORAGE TRADING 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 (Complaints Handling Procedure and Enforcement) Regulations, 2021)*

#### **A. INTRODUCTION**

1. The Office received a complaint on 13<sup>th</sup> March 2025 alleging that the Respondent has been using her personal data in the form of images for marketing without her consent.

#### **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' legal representatives on 13<sup>th</sup> March 2025. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations.
7. According to Regulation 11 of the Enforcement Regulations, the Office notified the Respondent of the complaint filed against it. The notification of the complaint to the Respondent was made via a letter referenced as **ODPC/CIE/CON/2/1 (201)**.
8. In the notification of the complaint, the Respondent was among other things asked to provide this Office with the following:
  - a) A response to the allegations made against them by the Complainant;
  - b) A contact person who can provide further details as regards to the complaint;
  - c) Details on how the Respondent obtained the Complainant's personal data;
  - d) The contractual agreement with the Complainant;
  - e) Whether the Complainant was notified and gave express consent for the use of their personal data for commercial purposes pursuant to section 37 of the Act;
  - f) Provide any relevant materials or evidence in support of the response;

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- g) A detailed procedure on how data subjects can exercise their data protection rights;
  - h) The Respondent's data protection policy;
  - i) Mitigation measures adopted or being adopted to address the dispute to the satisfaction of the Complainant and to ensure such occurrences do not recur.
  - j) Any other information that it may wish the Office to consider.
9. As at the date of this determination, the Respondent failed, refused, or neglected to respond to the Notification of Complaint.
10. This determination is therefore according to Regulation 11(2) of the Enforcement Regulations, which provides that where a Respondent does not take any action as contemplated in law, the Data Commissioner shall proceed to determine the complaint in accordance with the Act and these Regulations.

#### **D. NATURE OF THE COMPLAINT**

11. The Complainant concerns the complainant's allegations that the Respondent has been using the complainant's personal data in the form of images for marketing without her consent. The Complainant contends that despite her termination on 27th November 2024, the respondent continued to use her images in advertisements across Meta platforms: Facebook, Instagram, YouTube, and the respondent's website.

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

##### **i. THE COMPLAINANTS' CASE**

12. The Complainant stated that she was employed by the Respondent but was terminated on 27th November 2024. That inasmuch as her employment was terminated, the Respondent has been using her images in its marketing campaigns without her consent.
13. She stated that she never consented to the use of her images for marketing, advertising, or any other commercial purposes.
14. She further stated that the Respondent used her images in aggressive advertising campaigns on social media platforms such as Facebook, Instagram, and YouTube, leading to significant client acquisition and substantial profits.

15. She contended that the Respondent failed to anonymize her images, making her easily identifiable in advertisements, and despite the Complainant's employment coming to an end on 27<sup>th</sup> November 2024, the Respondent has continued to use her images in active advertisements across all Meta platforms, i.e Facebook and Instagram.
16. The Complainant further alleges that the Respondent, in addition to the Respondent using her images for advertisement without her consent, the Respondent also shared the same with other third parties who continued using the same for advertisement.
17. Also, the Complainant stated that there is another video advertisement being shared on one of the company directors' social media accounts and platforms, which include Instagram, Facebook, LinkedIn, etc.
18. The Complainant further stated that even after the termination of employment, the Respondent continued using her personal images for advertisement despite issuing a formal demand letter to the Respondent wanting the Respondent to cease using her personal images for advertisement without her consent.
19. To support her complaint, the Complainant adduced:-
- a) The video advertisements featuring the Complainant's image and the online links thereto.
  - b) An online link to the Respondent's company website.
  - c) An online link to one of the directors' social media accounts.

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

20. The Respondent stated that the Complainant was employed from 1<sup>st</sup> May 2019 to 30<sup>th</sup> November 2024, where she served as Sales Manager and one of her duties was to support the company's marketing and sales strategy.
21. The Respondents stated that the images were taken with the Complainant's full knowledge and consent during her employment, specifically in her capacity as a sales manager.

22. The Respondents stated that no economic benefit has been derived from the use of the images beyond what was earned during the Complainant's employment;
23. The Respondent stated that the Complainant consented to data processing during her employment.
24. To support their case, the Respondents adduced the employment contract between the Complainant and the Respondent.

#### **F. ISSUES FOR DETERMINATION**

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

- i. Whether the Respondent obtained express consent from the Complainant to process her personal data for commercial purposes; and
- ii. Whether the Complainants are entitled to any remedies under the Act and the attendant Regulations.

#### **I. WHETHER THE RESPONDENT OBTAINED EXPRESS CONSENT FROM THE COMPLAINANT TO PROCESS HER PERSONAL DATA FOR COMMERCIAL PURPOSES.**

20. It was the complainant's position that the Respondent has been using her personal data in the form of images for advertisement and or marketing without her consent.
26. It was the Respondent's position that during the Complainant's employment, they obtained the Complainant's consent and, the images were taken and used with her full knowledge and consent.
27. The Black's Law Dictionary, 10<sup>th</sup> Edition, defines consent as "agreement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person.
28. 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.

29. The definition of the Act details the minimum criteria of or 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.
30. 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.
31. 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)*
- 32) Section 37 (1) of the Act provides for 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 authorised 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."

33) 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.*

32. From the evidence adduced to this office, it is evident that the Respondent used the complainant's personal images to advertise its products. As such, the Complainant's image was being used to advance the Respondent's commercial and economic interests. By the general public visiting the Respondent's online platforms, one is induced, whether directly or indirectly, to buy, join and or subscribe to the Respondent's services. This constituted the use of the Complainant's image for commercial purposes, which required express consent.

33. As stated earlier, it was the Respondent's position that, considering the Complainant was a sales manager to the Respondent company, the use of her image for advertisement was inferred by her position. The Respondent also adduced the employment contract to demonstrate the employment relationship. The Office analyzed the employment contract and found that there is no contractual term to this effect.

34. Express consent requires a clear written statement confirming the granting of consent. It may take such forms as clicking an opt-in button or link, appending a signature, responding to an email requesting consent, selecting from yes or no options, *et cetera*. Where consent has been obtained orally, the same must be reduced into writing or recorded electronically, and a record of the script thereof be kept. That way, the consent can be proven by the Respondent as the burden of proof establishing a data subject's consent to the processing of their personal data for a specified purpose rests upon the data controller and or processor.

35. From the above, the Respondent's contentions fall short of what express consent entails as per the Act. In no circumstance is an implied consent inferred through action or by being an office bearer or a position holder, for instance, a sales manager, as in this case.
36. 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 her image for commercial purposes, as envisaged under Section 32 (1) and 37 of the Act.
37. This Office therefore finds that as far as issue no (i) is concerned, the Respondent did not obtain the requisite consent required by the Act to use the Complainant's image for commercial purposes.

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

38. 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.
39. As her relief, the Complainant sought that she be compensated and that this office directs the Respondent to pull down the marketing materials containing the Complainant's personal data from their platforms. The Respondent responded to this, contending that the order for compensation is not available under the law because the alleged data were lawfully collected and processed with the consent of the Complainant.
40. 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.

41.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.

42.Having found that the Respondent did not obtain express consent from the Complainants before using her images for marketing purposes, the Respondent is hereby directed to compensate the Complainant the amount of Kshs. **500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only)**.

### **G. FINAL DETERMINATION**

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

- i. The Respondent is hereby found liable.
- ii. The Respondent is hereby ordered to delete and or pull down the advertisements containing the Complainant's personal data from all its platforms and provide proof thereof to this Office within fourteen (14 )days from the date of this determination.
- iii. Failure to adhere to (ii) above, an Enforcement Notice shall hereby be issued.
- iv. The Respondent is ordered to compensate the Complainant **KES 500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only)**
- v. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

**DATED** at **NAIROBI** this 10<sup>th</sup> day of June 2025.



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