



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1574 OF 2024

FERDINAND OMANYALA OMURWA.....COMPLAINANT

-VERSUS-

OXYGENE MARKETING

COMMUNICATION 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 lodged a complaint on 8th October, 2024 alleging that the Respondent used his image to advertise its work on its website, without obtaining his express 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 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 8th 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 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 5th November 2024 and referenced ODPC/CONF/1/5 VOL II (284). 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;

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- 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 submitted its response *vide* two letters dated 18th November 2024 and 20th November 2024.
9. The parties attempted to resolve the dispute via mediation, facilitated by this Office in accordance with Section 9(c) of the Act. However, the mediation process was unsuccessful thereby necessitating the complaint to be determined as per Regulation 15(8) of the Enforcement Regulations.
10. This determination is therefore as a result of analysis of the complaint as received, the Respondent's response and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

11. The Complaint relates to the alleged use of the Complainant's image for commercial purposes without obtaining his express consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

12. The Complainant alleged that sometime between April to August 2024, he received a request from the Respondent to work on a project known as the "Making of A Star" on behalf of Safaricom PLC. However, due to unreconcilable differences, the Complainant declined to work on the project and requested the erasure of all the personal data received by the Respondent and Safaricom PLC regarding the project.
13. The Complainant averred that on 29th September 2024, while browsing through the internet, he discovered that the Respondent published a poster advertising its work and endorsing the project executed for Safaricom PLC via its website

(<https://oxygen.co.ke/work/>) using the Complainant's image and likeness without his express consent, authority, or license in gross violation of his right to privacy. He provided a screenshot of the image as proof.

14. Additionally, he stated that the Respondent used his image and likeness, without his express permission or any legal justification, to market its services through its website.
15. The Complainant asserted that the unauthorized use of his image and likeness for marketing purposes on the Respondent's website or any social media platform without his consent violated his brand rights, privacy, and trademark rights.
16. On 23rd September 2024, the Complainant sent a demand letter *vide* email to the Respondent. He provided a copy of the demand letter as proof.
17. On 26th September 2024, the Respondent acknowledged the breach of personal data expressing remorse without any recourse despite benefiting from the Complainant's personal data, according to the Complainant. On the same date, the Complainant sent a settlement proposal for the breach which did not elicit any response from the Respondent.
18. The Complainant averred that he derives his livelihood by partnering with brands for purposes of marketing their products through his name, image, and likeness. Further, the Respondent violated his right to earn a livelihood by unlawfully using his image to advertise its services on its website for commercial gain.
19. The Complainant states that he is entitled to the orders sought and more specifically compensation for illegal use of his images and likeness as prayed in this Complaint lodged before the Office of the Data Protection Commissioner.
20. The Complainant sought the following remedies from this Office: -
 - a) A declaration for the violation of the right to privacy of the Complainant and breach of the rights of a data subject by the Respondent.

- b) An order for compensation of the Complainant by the Respondent of Kshs. 10,000,000 for using the Complainant's images for commercial gain without his express consent.
- c) An enforcement notice against the Respondent.

ii. THE RESPONDENT'S RESPONSE

21. The Respondent stated that it is a communication agency that offers public relations services, digital media services, and marketing services amongst others.
22. The Respondent stated that it was contracted to work on a series known as 'The Making of a Star.' The project was intended to celebrate the achievements of Kenyan athletes and accentuate their journey to the 2024 Olympics. The Respondent intended to do this by narrating the personal and professional lives of the athletes in a bid to inspire others and unite the nation.
23. The Respondent averred that it identified a number of athletes to feature in the series, including the Complainant as he is a person of public interest and a Kenyan celebrity attributed to his sprints in the short races.
24. In preparation for the series, the Respondent interviewed the various athletes and took photographs of each one of them, including the Complainant. The photographs were taken with the consent of each of the athletes.
25. The Respondent asserted that the Complainant willingly and voluntarily provided his data to their client during the interview so that it could be featured in the series 'The Making of a Star.'
26. The Respondent stated that it put the photographs together and produced one montage of all the athletes including the Complainant. Each of the athletes was paid a token and the Complainant directed the Respondent to pay a token to his relatives.
27. Simultaneously, the Respondent was negotiating the contracts with each of the athletes. The Respondent provided a copy of the standard document used during negotiations as proof.

28. The Respondent posited that they successfully entered into contracts with the other athletes but not with the Complainant. Due to the Complainant's consistent change of his terms of engagement, both parties agreed to terminate the arrangement.
29. Pursuant to the termination, the Complainant's relatives refunded the token to the Respondent and the Respondent proceeded to remove and delete the Complainant's information as agreed by the parties and his interview was not aired to the public.
30. The Respondent admitted that its employees erroneously and accidentally uploaded the montage that featured the Complainant together with other athletes whilst uploading the photographs of the athletes who featured in the series 'The Making of a Star'.
31. The Complainant's Advocate wrote to the Respondent on 23rd September 2024, stating that it had breached the Complainant's brand rights, invasion of privacy, breach of copyright, and breach of trademark rights.
32. The Respondent acknowledged that a data subject is entitled to certain rights that are enumerated in the Data Protection Act. In its view, the Complainant in exercising his right to data protection informed the Respondent of the breach and the Respondent immediately rectified this by erasing the information and deactivating the page on its website.
33. The Respondent stated that it took the following steps to mitigate any damage:
- a) The Respondent immediately issued an apology over the error and retracted all the Complainant's material from its website as at 24th September 2024;
 - b) The Respondent conducted refresher training for its staff on data privacy and protection, what they are and are not authorized to do with the data they have access to in a bid to avoid a recurrence of such an incident;
 - c) The Respondent re-shared its policies and procedures with its staff to facilitate self-awareness regarding the importance of protecting data and keeping it confidential;

- d) The Respondent offered to work with the Complainant on an alternative project in a bid to settle the matter amicably;
- e) The Respondent introduced an additional level of approval in its organization before any data is processed;
- f) The Respondent is exploring the option of having an audit of every client after the completion or termination of a contract to ensure that all their information is secured and or deleted where necessary to avoid the recurrence of such an incident; and
- g) The Respondent is taking all reasonable steps to ensure that all its staff comply with the relevant data protection measures.

34. The Respondent stated that though the breach is highly regretted it did not pose a significant risk to the Complainant. The damages sought by the complainant are onerous and punitive for an error and omission that could have been made by anyone because human is to error. Further, the damages sought by the Complainant are substantial and will adversely affect the Respondent's ability to meet its financial obligations.

35. Contrary to the Complainant's allegations, the Respondent has not derived any commercial gain from the erroneous use of the Complainant's image on its website. According to the Respondent, the Complainant's image was on the Respondent's website for 12 days before the error was pointed out and the information was retracted and the page deactivated.

36. The Respondent's information shows that the page with the information had 24 portfolios which collectively attracted 277 views. Consequently, it can be assumed that each portfolio was viewed by an average of 11-17 people before the information was retracted and the page was deactivated. The Respondent provided a copy of its deck as proof.

37. The Respondent highlighted that the montage had other athletes who are celebrities in their own right and there is no proof or indication that the visits to the Respondent's page are solely attributed to the Complainant's image on the montage.

38. In conclusion, the Respondent stated that there are no prior data breach complaints against it.

F. INVESTIGATIONS UNDERTAKEN

39. The Office analysed the complaint as lodged, the Respondent's response and the supporting evidence provided by both parties.

40. The Office visited the Respondent's website and found that the Complainant's image had been pulled down.

G. ISSUES FOR DETERMINATION

41. It is not in contention that the Respondent published the Complainant's image on its website.

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

- i. Whether the Respondent used the Complainant's personal data for commercial purposes without obtaining consent; and
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENT USED THE COMPLAINANT'S PERSONAL DATA FOR COMMERCIAL PURPOSES WITHOUT OBTAINING CONSENT

43. 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.***"

44. 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.*"

45. 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. No evidence of this was presented to this Office.
46. The Respondent in its response, admitted that its employees erroneously and accidentally uploaded the montage that featured the Complainant together with other athletes whilst uploading the photographs of the athletes who featured in the series 'The Making of a Star'. The actions of the Respondent, whether accidental or intentional, amount to use of personal data for commercial purposes without obtaining express consent from the Complainant. The Respondent ought to have sought and obtained consent from the Complainant before uploading his photograph on its website.
47. The publishing of the Complainant's photograph on the Respondent's website advanced its commercial interests as it used the Complainant's image to market its services to the general public.
48. From the foregoing, this Office finds that the Respondent used the Complainant's personal data for commercial purposes without obtaining his express consent.

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

49. 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.
50. The Complainant prayed for a declaration for the violation of the right to privacy of the Complainant and breach of the rights of a data subject by the Respondent.
51. A declaration is not one of the remedies provided for in Regulation 14(3) of the Enforcement Regulations and therefore the above prayer is declined.

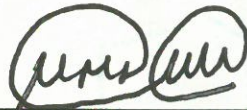
52. The Complainant also prayed for an order for compensation of Kshs. 10,000,000 for using the Complainant's images for commercial gain without his express consent.
53. Section 65 of the Act provides for compensation to data subjects and states, "*a person who suffers damage by reason of a contravention of a requirement of the Act is entitled to compensation for that damage from the data controller.*"
54. Section 65(4) of the Act states that, "*damage includes financial loss and damage not involving financial loss, including distress.*"
55. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
56. 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 his consent. Further, the Office considers the fact that the Respondent in compliance with Regulation 12(3) of the Data Protection (General) Regulations, 2021 pulled down the Complainant's image from its website immediately after the Complainant exercised his right of erasure.
57. The Office declines to award the Complainant Kenya Shillings ten million as prayed, as the amount is so inordinately high. The Office hereby **orders the Respondent to pay the Complainant Kenya Shillings five hundred thousand (KES. 500,000)** as compensation for the use of his personal data for commercial purposes without obtaining express consent
58. The Respondent is directed to put in place clear consent mechanisms and seek prior consent before publishing a data subject's image on its website. 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

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

- i. The Respondent is found liable of using of the Complainant's personal data for commercial purposes without obtaining his express consent.
- ii. The Respondent is directed to put in place clear consent mechanisms for the processing of personal data for commercial purposes.
- iii. The Respondent is hereby ordered **to pay the Complainant Kenya Shillings Five Hundred Thousand (KES. 500,000) 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 6th day of January 2025



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

