



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0466 OF 2025

ANTHONY MWAZUMBI NJOROGE.....COMPLAINANT

-VERSUS-

THE LEGEND HOTEL.....RESPONDENT

DETERMINATION

(Pursuant to Sections 8(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 alleges that the Respondent processed and/or continues to process his personal data for marketing purposes without a lawful basis.

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 25th March, 2025. 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 vide a letter dated 7th May, 2025 referenced ODPC/CIE/CON/2/1(284). In the notification of the complaint, the Respondent was informed that if the Complainant's allegations were true, they would be in violation of various sections of the Act. Additionally, the Respondent was 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 would provide further details regarding the complaint
 - c) Proof of consent from the Complainant to send promotional messages
 - d) Any relevant material and/or evidence in support of the statement of response
 - e) Detailed procedure of how data subjects exercise their data protection rights.

- f) Mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
- g) Any other information they wished the Office to consider.

8. The Respondent responded to the allegations made against it vide a letter dated 15th May 2025.

D. NATURE OF THE COMPLAINTS

9. The Complainant alleges that the Respondent unlawfully processed his personal data by sending him promotional messages without his consent. He further claims that despite receiving a confirmation that he had successfully opted out of such communications, the Respondent continued to send him marketing messages. A conduct which he asserts amounts to a failure to respect his statutory right to object to the processing of his personal data for direct marketing purposes and constitutes a breach of the principles of lawfulness fairness and transparency under the Act.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

- 10. The Complainant claims that the Respondent, either directly or through its agents, repeatedly sent him direct marketing and promotional messages despite his having exercised his right to object by opting out.
- 11. The Complainant alleges that the Respondent did not obtain his express consent to use his personal data for commercial and promotional purposes.
- 12. Additionally, he pleads that the opt-out mechanism provided in the promotional messages is not functional, as he has attempted to utilize it without success, yet continues to receive unsolicited marketing messages, indicating the Respondent's non-compliance with the obligation to provide a clear and effective means to object to such processing.

13. The Complainant asserts that the Respondent has violated his rights as a data subject by processing his personal data without a lawful basis, as required under the Act.

ii. THE RESPONDENT'S RESPONSE

14. The Respondent pleads it lawfully collects all contact details directly from its data subjects during payment made electronically *via* mobile banking at the point of transaction. It further asserts that this data is not shared with any third parties.

15. The Respondent states that it uses the collected contact information solely for the purpose of sending promotional messages intended to inform clients of upcoming events that may be of interest, and not for any malicious or unlawful purpose.

16. The Respondent claims that such promotional messaging is a common and accepted practice within various industries, including banking, hospitality, and retail and is aimed at enhancing customer engagement and service awareness.

17. The Respondent further avers that each promotional message includes an advisory allowing recipients to opt out if they do not wish to receive further communication, and that any continued receipt of messages following an opt-out request can only result from technical anomalies beyond its control.

18. The Respondent notes that this is the first recorded instance of negative feedback concerning its promotional messaging practices, and that prior to this, no similar complaints had been received.

19. The Respondent emphasizes that it has taken the Complainant's feedback seriously and has promptly removed the subject phone number from its system to prevent any further communication.

20. The Respondent states that it regrets any inconvenience or distress caused to the Complainant and reiterates its commitment to protecting customer data and respecting privacy rights.

F. INVESTIGATIONS UNDERTAKEN

21. After a thorough analysis of the evidence on record and the applicable law, the Office established that the Complainant continued to receive marketing and promotional messages from the Respondent.
22. The Complainant provided evidence confirming that he opted out of receiving such messages on 5th April 2025 and received an acknowledgment of the same. Despite this, he demonstrated that he received further promotional messages from the Respondent on 20th April 2025 and 1st May 2025.
23. The Respondent did not provide the Office with any evidence of having obtained the Complainant's express consent to process his personal data for further commercial or promotional purposes. While the Respondent claimed that the continued messaging was due to a technical lapse that had since been resolved, it failed to furnish any supporting evidence to substantiate this assertion.
24. The Respondent also failed to demonstrate that it provided the Complainant with any follow-up communication or confirmation regarding the request for erasure and deletion of his personal data from its systems.

G. ISSUES FOR DETERMINATION

25. In light of the above, the complaint, the Respondent's responses and evidence adduced together with the investigations conducted, the following issues fall for determination by this Office:
 - i. Whether the Respondent fulfilled its obligations under the Act;
 - ii. Whether there was a violation of the Complainant's rights under the Act; and
 - iii. Whether the Complainant is entitled to any remedies under the Act.

I. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

26. In considering this issue, the Office will examine whether the Complainant consented to the use of his personal data for direct marketing purposes.

27. Section 25(c) of the Act provides, that every data controller or data processor shall ensure that personal data is collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes.

28. The Respondent submitted that it collects contact details directly from data subjects when they choose to use mobile money at the point of transaction. However, such contact information is provided solely for the purpose of facilitating payment for a product or service. Any further processing of these contact details for promotional or marketing purposes, without obtaining additional and specific consent, contravenes Section 25(c) of the Act, which establishes the principle of purpose limitation, requiring that personal data be collected for explicit, specified, and legitimate purposes and not further processed in a manner incompatible with those purposes.

29. Section 25(g) of the Act provides, that every data controller or data processor shall ensure that personal data is kept in a form which identifies the data subjects for no longer than is necessary for the purposes which it was collected. Retaining contact details after payment of a product and/or service and subsequently further processing such data for promotional or marketing purposes, without obtaining additional and specific consent from the data subject, constitutes a breach of the purpose and storage limitation principles under the Act.

30. 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 –*

a) Has sought and obtained express consent from a data subject; or

b) 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."

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31. 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.*
32. By constantly sending messages to the Complainant's phone number to market their products to him, the Respondent was processing the Complainant's personal data for commercial purposes as defined above.
33. Regulation 15 of the General Regulations sets out the permitted commercial use of personal data and states that, *"a data controller or data processor may use personal data, other than sensitive personal data, concerning a data subject for the purpose of direct marketing where—*
- a) the data controller or data processor has collected the personal data from the data subject;*
 - b) a data subject is notified that direct marketing is one of the purposes for which personal data is collected;*
 - c) the data subject has consented to the use or disclosure of the personal data for the purpose of direct marketing;*
 - d) the data controller or data processor provides a simplified opt out mechanism for the data subject to request not to receive direct marketing communications; or*
 - e) the data subject has not made an opt out request."*

34. It was upon the Respondent to demonstrate that it had collected the personal data from the data subject, notified the data subject that direct marketing is one of the purposes for which the personal data is collected, obtained express consent from the

Complainant before reaching out to him to market their services and provided a simplified opt out mechanism. This burden was not discharged by the Respondent as it failed to prove that it obtained consent from the Complainant.

II. WHETHER THERE WAS A VIOLATION OF THE COMPLAINANT'S RIGHTS UNDER THE ACT.

35. Section 26(a) of the Act provides for the right to be informed of the use to which a data subject's personal data is to be put. The Respondent, by not informing the Complainant of the use to which his personal data was to be put, at the point of collection of the personal data, violated his right to be informed. The Respondent's agents did not inform him that his personal data was being collected and the use to which it was to be put.
36. In addition, the Complainant submitted evidence demonstrating that he exercised his right to object to the processing of his personal data for commercial purposes, as provided under Section 26(c) of the Act, as read together with Section 40(1)(b) of the Act. This was done by unsubscribing and/or opting out of receipt of promotional and marketing messages from the Respondent on 5th April 2025, which the Respondent acknowledged. The exercise of this right imposed a legal obligation on the Respondent to cease further processing of the Complainant's personal data for marketing purposes, and to act on the erasure request without undue delay.
37. Despite the Complainant exercising his right to object he continued to receive marketing and promotional messages from the Respondent on 20th April and 1st May 2025. The Respondent attributed this to possible technical anomalies but failed to provide any evidence to substantiate this claim.
38. From the above, this Office finds that the Complainant's rights under Sections 26(a) & (c) of the Act were violated by the Respondent.

III. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDIES UNDER THE ACT

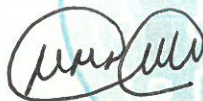
39. Pursuant to Regulation 14(2) of the Enforcement Regulations, a determination shall state the remedy to which the Complainant is entitled. Further, the remedies are provided for in Regulation 14(3) of the Enforcement Regulations.
40. As a remedy, the Complainant requested that the Respondent erase his personal data from its records / systems and database and any other record and monetary compensation for the violation of his right as a data subject.
41. Section 65(1) of the Act provides, that a person who suffers damage by reason of a contravention of a requirement of this Act is entitled to compensation for that damage from the data controller or the data processor. Section 65(2) provides, a data controller involved in processing of personal data is liable for any damage caused by the processing.
42. Section 65(4) of the Act provides that "damage" includes financial loss and damage not involving financial loss, including distress.
43. Having found that the Respondent failed to uphold the rights of the Complainant as a data subject as envisaged under Section 26 (a) & (c), and the Respondent as a data controller processed the Complainant's personal data for commercial purposes without consent, it then follows that the Complainant is entitled to compensation. The Respondent is hereby directed to compensate the Complainant **KES 250,000 (Two Hundred Thousand Kenya Shillings)**.
44. In so doing, this Office takes into account the nature and extent of violation with regard to unlawful processing of the Complainant's personal data and the conduct of the Respondent.
45. Having found that the respondent failed to fulfil its obligations under the Act and attendant regulations, an Enforcement Notice shall be issued against the Respondent pursuant to Section 58 of the Act and the Regulation 16 of Enforcement Regulations.

H. FINAL DETERMINATION

46. In consideration of all the facts of the complaints, the evidence tendered and the investigations conducted, the Data Commissioner makes the following determination:

- i. The Respondent is hereby found liable.
- ii. The Respondent is ordered to compensate the Complainant **KES 250,000 (Two Hundred and Fifty Thousand Kenya Shillings)**.
- iii. Enforcement Notice is hereby issued to the Respondent.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 22nd day of June 2025



**Immaculate Kassait, MBS
DATA COMMISSIONER**

KENYA