



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 0474 OF 2025**

**QUINCY JESEE KIPTOO .....COMPLAINANT**

**-VERSUS-**

**PEPINOS PIZZA INN .....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 with the Office asserting that Respondent have been sending him unwarranted promotional messages without his 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 25<sup>th</sup> March 2025. 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 Respondents of the complaint filed against them *vide* a letter dated 15<sup>th</sup> April, 2025 and referenced ODPC/CIE/CON/2/1 (235). In the Notification of the Complaint, the Respondent was informed that if the allegations by the Complainant were true, they were 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 them by the Complainant;
  - b. A contact person who can provide further details as regards to this complaint
  - c. Proof of Consent from the Complainants to send him promotional messages in regards to your products
  - d. Provide any relevant materials or evidence in support of your response above.
  - e. A detailed procedure on how data subjects can exercise their data protection rights,

- f. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant if any;
  - g. Any other relevant information they wish the Office to consider.
8. The Respondent submitted their response vide a letter dated 12<sup>th</sup> May 2025.
9. This determination is therefore as a result of analysis of the complaint as received, the respondent responses and investigations conducted by the Office.

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

10. It is the Complainant averments that the Respondent unlawfully processed his personal information and started sending him unwarranted promotional messages without his consent.

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

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

11. The Complainant, avers that he is a male adult of sound mind residing and working for gain in Nairobi, Kenya as an advocate of the High Court of Kenya.
12. The Complainant states that the Respondent, trading as Pepino's Pizza and operating under the website <https://pepinospizza.co.ke/>, is duly registered as a restaurant business and carries on its operations at its premises within Nairobi.
13. The Complainant asserts that he primarily resides and works along Ngong Road, rarely visiting Town or Ruaka, where the Respondent's outlets are located, and as such had no interactions with the Respondent to justify direct marketing.
14. The Complainant avers that on 6<sup>th</sup> March 2025, he received a promotional message at his personal number 07\*\*\*\*\* advertising pizza and chicken offers. He further avers that similar direct messages were sent on 20<sup>th</sup> and 24<sup>th</sup> March 2025.
15. The Complainant contends that the Respondent sent these messages without his prior consent, that he never registered with the Respondent, and that the Respondent failed to obtain a lawful basis for processing his personal data, including his phone number.

16. The Complainant asserts that none of these promotional messages provided him with an opportunity to opt-out, withdraw consent, or object to the processing of his personal data for direct marketing purposes as is his absolute right under the law.
17. The Complainant avers that the repeated and intrusive promotional messages have caused him undue emotional distress, anxiety, inconvenience, and disrupted his peace of mind.
18. The Complainant further states that by continuously sending unsolicited promotional messages without consent and without an opt-out mechanism, the Respondent violated his rights under the Data Protection Act and its attendant regulations.
19. The Complainant contends that the Respondent failed to inform him that his personal data would be used for marketing purposes and failed to respect his right to object to such processing.
20. The Complainant asserts that these persistent messages constitute an egregious breach of data protection and privacy laws, amounting to unlawful direct marketing, for which he is entitled to redress.
21. The Complainant purports that the Honorable Commissioner issue a stern warning and award appropriate compensation to deter such blatant disregard of the law and to remedy the substantial emotional and psychological harm caused.
22. The Complainant concludes that the Respondent's failure to provide an opt-out mechanism and its unauthorised processing of his personal data without a lawful basis erodes public trust in the lawful handling of personal data and warrants appropriate legal action.
23. The Complainant provided a screenshot of the test messages.

## **ii. THE RESPONDENTS' RESPONSE**

24. The Respondent acknowledges receipt of Complaint No. ODPC/COMP/0474/2025 concerning alleged unsolicited promotional messages sent to the Complainant.

25. The Respondent states that it is a duly registered restaurant business operating in Nairobi City under the trade name *Pepino's Pizza*, with its business address for purposes of this Complaint being c/o MKN & Co. Advocates, Bruce House, Standard Street, P.O. Box 929-00100 Nairobi.
26. The Respondent avers that it owns and operates the website <https://pepinospizza.co.ke>, which contains a publicly accessible Privacy Policy (attached) that outlines how customers' personal data is collected, used, disclosed, and safeguarded.
27. The Respondent asserts that the Privacy Policy states clearly that it may collect a customer's name, email address, phone number, delivery address, and payment information, and that this information is used to process and fulfill orders, respond to customer service inquiries, and send promotional messages such as special offers and marketing communications.
28. The Respondent further contends that the Complainant has previously engaged with its services as a paying customer. Specifically, the Respondent states that the Complainant made a dine-in order for a six-piece meal with fries on 19<sup>th</sup> May 2022 at 17:04 hrs — which was fully paid for via M-PESA — and that evidence of this transaction is annexed herein.
29. The Respondent asserts that its Privacy Policy provides that by sharing one's contact information, the individual consents to receive promotional messages from the Respondent, including marketing offers by email, SMS, and push notifications.
30. The Respondent further states that its Privacy Policy outlines a straightforward process to opt out of promotional communications and exercise one's rights under data protection law. The Complainant was at all times able to contact the Respondent to request deletion of his personal data or to object to processing for direct marketing purposes.
31. The Respondent maintains that it has never received any formal request for data deletion or objection to direct marketing from the Complainant prior to the lodging of this Complaint. The Respondent also asserts that its contact details — including its email address at [support@pepinospizza.co.ke](mailto:support@pepinospizza.co.ke) and telephone number

07\*\*\*\*\* have been functional and successfully used by the Office of the Data Protection Commissioner to reach the Respondent.

32. The Respondent denies that it failed to inform the Complainant that his personal data would be used for direct marketing or failed to provide him an opportunity to opt out of receiving such messages.
33. The Respondent contends that the Complainant had sufficient information at his disposal to object to the processing of his personal data for marketing purposes, yet failed to exercise the opt-out options as outlined in the Privacy Policy.
34. Accordingly, the Respondent respectfully prays that the Complaint be dismissed as it lacks legal basis

### **iii. THE COMPLAINANT'S FURTHER RESPONSE**

35. The Complainant responded to the Respondent response vide a letter dated 4<sup>th</sup> June 2025.
36. The Complainant acknowledges the Respondent's averment that he visited its premises on 29<sup>th</sup> May 2022 and made payment for a "6-piecer" with two fries via M-Pesa. However, the Complainant states that the transaction record only confirms that a payment was made on 29<sup>th</sup> May 2022 and does not establish any prior visit on 19<sup>th</sup> May 2022 as purported by the Respondent.
37. The Complainant notes that, given the passage of time, he cannot recall the specific details of the visit but contends that making a payment via M-Pesa does not amount to express consent as envisaged under the Data Protection Act, 2019.
38. The Complainant avers that while the receipt annexed by the Respondent confirms payment via M-Pesa, such mode of payment cannot be relied upon as evidence of express consent to the processing of personal data for marketing purposes.
39. The Complainant further states that under the Data Protection Act, consent is defined as an unequivocal, free, specific, and informed indication of the data subject's wishes. The Complainant contends that a mere commercial transaction cannot satisfy this threshold.

40. The Complainant complains that at no point did he expressly consent to receive marketing messages from the Respondent, and there was no affirmative action on his part — such as ticking a box, signing a form, or clicking an “I agree” option — that would signify his consent.
41. The Complainant states that he was never informed of the existence of the Respondent’s privacy policy at the time of the transaction on 29<sup>th</sup> May 2022 and asserts that he is only now seeing this policy in the context of these proceedings.
42. The Complainant notes with concern that the Respondent purports to rely on a privacy policy that was neither displayed nor communicated to him at the material time. The Complainant contends that transparency is a cornerstone of data protection law and that attempting to justify the processing of personal data by relying on undisclosed terms is improper.
43. The Complainant further states that the Respondent’s actions appear to be an afterthought aimed at creating post-facto legitimacy for data processing that ought to have been based on informed consent from the outset.
44. The Complainant avers that at the time of the transaction, he was unaware that the Respondent had a website, and the Respondent failed to provide any means or reasonable opportunity for him to access or review the privacy policy prior to or during the transaction.
45. The Complainant contends that the Respondent has not provided any credible evidence that its website was functional on the material date or that its privacy policy was brought to his attention before his personal data was collected and processed.
46. The Complainant notes that the privacy policy was neither displayed at the Respondent’s premises nor referenced on its receipts, and there was no means by which he could have reviewed it during his visit.
47. The Complainant states that as a walk-in customer, he had no legal obligation to search the Respondent’s website or hunt for its privacy policy. Instead, the Complainant avers that the burden lies solely with the Respondent to obtain express and informed consent before using his personal data for marketing.

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48. The Complainant complains that merely making a purchase cannot imply consent to receive promotional messages, especially when he was not given any prior information or opportunity to opt in or opt out.
49. The Complainant contends that relying on a privacy policy hidden on a website is insufficient to meet the legal threshold of informed consent because the Complainant was never directed to it and he was never placed in a position where reviewing the policy was practical.
50. The Complainant states that consent must be opt-in and cannot be assumed and notably, the Complainant further notes that even after filing this Complaint, the Respondent continued to send unsolicited promotional messages, including one on 14<sup>th</sup> April 2025, which underscores the Respondent's disregard for his data protection rights and the seriousness of these proceedings.
51. The Complainant avers that none of the promotional messages received contained a visible or easy opt-out mechanism as required by Regulation 16 of the Data Protection (General) Regulations, 2021.
52. The Complainant contends that the Respondent now purports that an opt-out could have been exercised by contacting them via email at [support@pepinospizza.co.ke](mailto:support@pepinospizza.co.ke) a process which was never explained to him at the material time and is unduly burdensome.
53. The Complainant states that such a process falls short of the requirements of transparency, accessibility, and ease of withdrawal of consent under the Data Protection Act.
54. The Complainant notes that the Respondent was able to obtain his personal data without complication at the point of payment but failed to make it equally straightforward for him to opt out of direct marketing.
55. The Complainant avers that he was never given any opportunity to object, withdraw consent, or request erasure of his personal data before its use for marketing purposes and neither was the Respondent's privacy policy accessible to him at the time of the transaction and was never brought to his attention.
56. The Complainant further states that under Section 37 of the Data Protection Act, a data controller shall not use personal data for commercial purposes unless the

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data subject has given express consent or the controller is permitted by law and the data subject was informed of such use when the data was collected.

57. The Complainant complains that no such consent was ever given, nor was he informed that making a payment via M-Pesa would result in receiving promotional messages.
58. The Complainant notes that the promotional messages lacked any opt-out mechanism as required under Regulation 15(1)(d) of the Data Protection (General) Regulations, 2021, and that Section 26(a) of the Data Protection Act requires a data subject to be informed of the purpose for which personal data is being processed.
59. The Complainant further avers that Regulation 16 of the Data Protection (General) Regulations, 2021 obligates the Respondent to include an opt-out feature that is clear, visible, accessible, free of charge, and user-friendly, which the Respondent failed to do.
60. Accordingly, the Complainant states that the Respondent has failed to obtain his informed, express consent for processing his personal data for direct marketing, failed to provide any opt-out feature in its messages, and failed to respect his data protection rights.
61. The Complainant contends that these unlawful actions caused him unwarranted anxiety, distress, emotional discomfort, and annoyance, and amount to a serious violation of his privacy under the Data Protection Act.
62. Complainant prayed for the following remedies.
- i. The Immediate removal/ deletion of his personal details from all Respondent's platforms.
  - ii. Provision of proof of 1 above.
  - iii. Monetary compensation for emotional distress, invasion of privacy, annoyance and inconvenience in the sum of Kshs 550.000
63. The Complainant provided the following documents in support his complaint:
- i. A copy of certificate of business registration for the Respondent.
  - ii. A copy of the text messages sent.
  - iii. A copy of certificate of electronic evidence.

## **F. ISSUES FOR DETERMINATION**

64. 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 and attendant regulations.
- ii. Whether the Respondent fulfilled its obligation under the Act and its attendant regulation.
- 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**

65. Section 26(a) of the Data Protection Act, 2019 guarantees every data subject the right to be informed about the processing of their personal data, including the specific purpose for which it will be used.

66. In this matter, the Respondent failed to inform the Complainant at the point of making a payment via M-PESA that the personal data collected would be further processed for sending promotional text messages. By doing so, the Respondent acted in breach of Section 26(a) of the Act.

67. By omitting to provide this crucial information and proceeding to utilize the data for a purpose that was neither disclosed nor authorized, the Respondent acted in contravention of its duties under the Act and infringed upon the Complainant's right to be fully informed about the processing of his personal data.

68. In light of the above, the Respondent is in violation of Section 26(a) of the Act.

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

69. In addressing this issue, the Office will address the following question –

- a. Did the Respondent Process the Complainant's data in accordance with the requirements for commercial use?

70. Section 37(1) of the Data Protection Act, 2019 clearly stipulates that:

*A person shall not use, for commercial purposes, personal data obtained pursuant to the provisions of this Act unless the person:*

- i. *has sought and obtained express consent from a data subject; or*
- ii. *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."*

71. Under Section 2 of the Act, "consent" is defined 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 relating to the data subject"*. In this matter, the Respondent was required to obtain the Complainant's express, unequivocal, free, specific, and informed consent before using his personal data for any marketing or promotional activities. The mere fact that the Complainant conducted an M-PESA transaction does not, in itself, satisfy or imply the consent contemplated by the Act.

72. In addition to under Section 32(1) of the Data Protection Act, 2019, it stipulates that *"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"*. The Respondent has failed to discharge this burden, as it has not demonstrated that the Complainant granted the requisite consent for the processing of his personal data for marketing or promotional activities.

73. Further, Regulation 14 (1) and (2)(c) of the Data Protection (General) Regulations, 2021 provides as follows:

*14(1) 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. Moreover regulation 14 (2) (c) provides that 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, sending an electronic message to a data subject about a sale, or other*

*advertising material relating to a sale, using personal data provided by a data subject.*

74. In this matter, the Respondent, after obtaining the Complainant's personal data during a routine M-PESA transaction, proceeded to use that data for direct marketing by sending promotional text messages advertising and enticing the Complainant to purchase its products (pizzas). This clearly falls within the scope of Regulation 14(1) and 14(2)(c), which define the use of personal data for the advancement of commercial interests and direct marketing.

75. The Respondent's assertion that the Complainant's act of making a payment via M-PESA amounted to implicit consent for such marketing or promotional messages is untenable. A routine financial transaction does not satisfy the requirement for "express, unequivocal, free, specific, and informed" consent envisaged under Section 37(1)(a). Moreover, the Respondent has failed to demonstrate any lawful authorization for such processing under Section 37(1)(b), nor any evidence that the Complainant was informed at the point of data collection that his personal data would be used for marketing and promotional messages.

76. In the absence of such consent or lawful authorization, and given that the Complainant was not informed of any intended use of his data for marketing or promotional messages, the Respondent acted in breach of Section 37(1) of the Data Protection Act, 2019, as read together with Regulation 14(1) and 14(2)(c), of the Data Protection (General) Regulations, 2021.

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

77. 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.

78. The Complainant requested this Office to issue an award of compensation of Kshs 550,000. Section 65 of the Act provides 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. The Section indicates that damage included financial loss and damage not involving financial loss including distress.

79. Further, Regulation 14 (3) (e) of the Enforcement Regulations provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent. In this case the Respondent failed to inform the Complainant at the point of making payment that his data will be further used to send him promotional text messages thus violating section 26(a) of the Act.

80. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's right to be informed under Section 26(a) was infringed and the Respondent failed to fulfil its obligation.

81. In this context, the Respondent is hereby ordered to pay the Complainant **Kenya Shillings Two hundred and Fifty Thousand (KES 250,000)** for the infringement of his rights under the Act.


82. The Complainant prays for deletion of all his details from the Respondent platforms. Having found that the Respondent failed to fulfill its obligations under the Act and attendant regulations, an Enforcement Notice shall issue against the Respondent pursuant to Section 58.

#### **G. FINAL DETERMINATION**

83. The Data Commissioner therefore makes the following final determination: -

- i. The Respondent is found liable.
- ii. An enforcement notice to hereby be issued to the Respondent.
- iii. The Respondent to pay the Complainant a sum of **Kenya Shillings Two Hundred and Fifty Thousand (KES 250,000)** 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 22<sup>nd</sup> day of June 2025.



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

