



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0396 OF 2025

SAIRA M IQBAL.....COMPLAINANT

-VERSUS-

OLIVIA HAIR T/A DI LORENZO 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 complaint concerns the allegation that the Respondent processed and continues to process the Complainant's image for commercial 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 14th 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 him *vide* a letter dated 4th April 2025 referenced ODPC/CIE/CON/2/1 (203). 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 this complaint;
 - c) Provide any relevant materials or evidence in support of their response above;
 - d) Details on how you obtained the Complainant's personal data;
 - e) The contractual agreement if any with the Complainant;
 - f) An elaborate representation of how data subjects can exercise their rights in relation to data protection;

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- g) 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 do not take place again; and
 - h) Any other information you wish the Office to consider.
8. The Respondent failed, refused or neglected to responded to the Notification of Complaint.

D. NATURE OF THE COMPLAINT

9. The Complainant alleges that the Respondent used her image to advertise, market and promote its beauty product without her consent or any other lawful basis.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i) THE COMPLAINANTS' CASE

10. The Complainant alleges that the Respondent, has used and continues to use her image for commercial purposes without obtaining her consent.
11. She states that no informed or explicit consent was ever sought or obtained from her regarding the intended use of her image.
12. The Complainant alleges that the Respondent has financially benefited from the unauthorized use of her image by marketing its beauty products.
13. She further claims that these products are distributed both nationally and internationally through various supply chains.
14. The Complainant states that her image and likeness constitute personal property with economic value and that the continued use of her image without consent infringes on her right to privacy.
15. She avers that she has suffered reputational harm and emotional distress on grounds that she must work for a living while the Respondent continues to profit from her image without offering any form of compensation.

ii) THE RESPONDENT'S CASE

16. The Respondent refused and/or neglected to respond to the Notification of Complaint filed against it. Therefore, the allegations levelled against it remain uncontroverted.

F. INVESTIGATIONS UNDERTAKEN

17. In exercising its investigative mandate as provided for in the Act, this Office conducted internal investigations on all documentation submitted.

18. The Respondent despite having been notified of the complaint filed against him, he refused, failed and neglected to furnish the Office with a response. This act amounts to non-cooperation with the Office and non-compliance with an order of the Data Commissioner contrary to Section 57(1)(c) and (3) of the Act.

G. ISSUES FOR DETERMINATION

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

- i. Whether the Respondent obtained the complainant's consent as required by the act to use her image for commercial purposes
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENT OBTAINED THE COMPLAINANT'S CONSENT AS REQUIRED BY THE ACT TO USE HER IMAGE FOR COMMERCIAL PURPOSES

20. 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.

21. 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. There must be a clear signal that they agree or have agreed to the processing. The

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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 to the processing.

22. From a combined reading of the above definitions, it is apparent that valid consent is a product of conscious decision-making and requires affirmative action. It should be demonstrable and capable of being proven.

23. 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.

24. The Act goes further to state the conditions of consent. It states as follows concerning 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)

25. 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."

26.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.

27.It is undisputed that the Respondent used the Complainant's image on a public business social account to advertise and market its hair beauty product, consequently, the Complainant's image was used to further the Respondent's commercial and economic interests. The use of the Complainant's image, visible to the general public, was and still is intended to induce potential clients, whether directly or indirectly, to use the Respondent's services. This use of the Complainant's image for commercial purposes required explicit consent.

28.It is trite that where consent has been obtained orally, the same must be reduced into writing or recorded electronically, with an obtainable script. 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.

29.The Respondent failed, refused and/or neglected to provide any response or submit a statement to this Office addressing the allegations made against him, despite being afforded the opportunity to do so.

30.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.

31. 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 COMPLAINANT IS ENTITLED TO ANY REMEDIES UNDER THE ACT.

32. 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.

33. In consideration of the complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent processed the Complainant's image for commercial purposes without the requisite consent it therefore follows that there has been a violation of the Act by the Respondent.

34. 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.

35. 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.

36. Having found that the Respondent has failed to prove that it obtained express consent from the Complainant, and considering the Respondent's continued use of the Complainant's image on its public social media marketing platform, the Respondent is hereby directed to compensate the Complainant the amount of **Kshs. 500,000/= (Kenya Shillings Five Hundred Thousand Only)**.

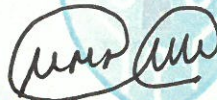
37. In so doing, this Office takes into account the nature and extent of violation with regard to unlawful processing of the Complainant's personal data and the period of violation.

I. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for processing the Complainant's personal data for commercial purposes without express consent.
- ii. The Respondent is ordered to compensate the Complainant **Kenya Shillings Five Hundred Thousand Only (KES 500,000.)**
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 11th day of June 2025



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**