



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 0508 OF 2025**

**STEPHEN KIPCHUMBA KIPTINESS.....COMPLAINANT**

**-VERSUS-**

**NEQTAR MEDICAL LTD.....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 alleged that the Respondent has been using the Complainant's image for commercial gain on its brochures without the Complainant's 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 '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 determination relates to a complaint reinstated by the Complainant pursuant to Regulation 7 (3) of the Data Protection ( Complaints Handling Procedure and Enforcement) Regulations, 2021. The initial complaint was discontinued on 1<sup>st</sup> December 2024. Subsequently, after the discontinuation, in line with Regulation 7 (3), the Complainant applied for reinstatement. In his application for reinstatement, the Complainant provided numerous grounds for reinstatement. He went further and demonstrated the said grounds for reinstatement to this office.
7. On 2<sup>nd</sup> April, upon conducting a thorough interrogation of the grounds for reinstatement, the Application for reinstatement was allowed and the Complaint was admitted afresh.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the reinstated complainant *vide* a letter dated 8<sup>th</sup> April, 2025 referenced ODPC/CIE/CON/2/1(215). 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 sections of the Act. Further, among other things, 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 the complaint;
  - c) Any relevant materials or evidence in support of their response;

- d) The lawful basis relied upon to process the Complainant's personal data;
  - e) How the Complainant's image was obtained;
  - f) Evidence as to whether the Complainant consented to the processing of his photos for commercial purpose;
  - g) Any contractual agreements between the Respondent and the Complainant;
  - h) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant; and
  - i) Any other information that the Respondent wishes the office to consider.
9. To date, as at the date of this determination, the Respondent has not responded to the Notification of the reinstated Complaint.

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

10. The Complainant alleged that the Respondent, without proper and/or justifiable cause, processed his image without his consent for marketing and commercial purposes on its brochures.

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

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

11. The Complainant contends that the Respondent and their management approached him for legal professional services, after which, they then publicized and indicated to various private and public entities that the Complainant and the firm that he works for are their legal partners.
12. The Complainant contends that the publication contained his personal data, specifically his name and photo.
13. He further stated that the publication was done without his authority, and or consent.
14. To the Complainant, the publication has helped the Respondent gain commercially as they have now proceeded to set up their business in Kenya.
15. To support his complaint the Complainant adduced:-

- a) A copy of the Respondent's brochure showing his name, photo and description published on page 19.
- b) Email confirmation from the 2<sup>nd</sup> Respondent highlighting the use of the details and display in their portfolio which confirms their doing it without seeking consent.

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

16. Despite the office's notifications on the relodged complaint no. ODPC/COMP/0508/2025 and numerous reminders/follow-ups, the Respondents failed to provide a response or evidence to the contrary. As such the allegations levelled against it remain uncontroverted.

## **F. INVESTIGATIONS UNDERTAKEN**

17. In exercising its investigative mandate as provided for in the Act, this Office summoned the Complainant to our offices on 28<sup>th</sup> March 2025 in which the Complainant shed more light on the complaint.

## **G. ISSUES FOR DETERMINATION**

18. 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 his personal data for commercial purposes; and
- 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 HIS PERSONAL DATA FOR COMMERCIAL PURPOSES**

19. 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.

20. 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.
21. 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.
22. 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.
23. 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).*
24. 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.*"

25. 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.*

26. It is undisputed that the Respondent used the Complainant's name and image in its brochures to advertise and market its facilities and services. As such, the Complainant's name and image was being used to advance the Respondent's commercial and economic interests.

27. Despite being given an opportunity to respond to the reinstated Complaint, the Respondent did not file a response to the allegations brought by the Complainant. As stated above in paragraph 16 the Respondent was duly notified of the complaint and was required to respond to the allegations against it within the prescribed timelines contained in the notification letter. As such, the Complainant's allegations remain uncontroverted.

28. 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 personal data for commercial purposes.

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

29. According 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.

30. As his relief, the Complainant sought for compensation for the misinterpretation of his affiliation with the Respondents.

31. Having considered the merits of the complaint, the evidence adduced, and having found that the Respondent processed the Complainant's image for commercial purposes without the requisite consent as stipulated under the Act, it therefore, follows that there has been a violation of the Act by the Respondent to that extent. The Respondent did not process the Complainant's personal data in accordance with Sections 30 (1) (a) and 32 (1) and 37 of the Act.
32. 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.
33. 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.
34. Having found that the Respondent did not obtain the requisite consent from the Complainant, to use his personal data on its brochures, the Respondent is hereby directed to compensate the Complainant the amount of **KES 500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only)** for the use of his personal data for commercial purposes without his consent.

## **I. FINAL DETERMINATION**

35. In the ultimate, the Data Commissioner makes the following final determination;
- i. The Respondent is hereby found liable for the use of the Complainant's personal data for commercial purposes without express consent.
  - ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Five Hundred Thousand (KES 500,000)** as compensation.

- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 26<sup>th</sup> day of June 2025.



**IMMACULATE KASSAIT, MBS  
DATA COMMISSIONER**

