



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 0162 OF 2025**

**WINFRED KIRUMBA SUING ON BEHALF OF  
LK(MINOR).....COMPLAINANT**

**-VERSUS-**

**HAIR MANUFACTURING LIMITED (DARLING KENYA).....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 lodged on 11<sup>th</sup> February 2025 relates to the alleged use of the Complainant's minor's image for commercial purposes on the Respondent Facebook page without obtaining consent from the Complainant.

**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

*KK*

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 11<sup>th</sup> February 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 20<sup>th</sup> February, 2025 and referenced ODPC/CIE/CON/2/1 (069). 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. Any relevant materials or evidence in support of your response above
  - d. Whether the Complainant consented to the use of the child's photo for commercial purposes;

*NA*

e. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant if any;

f. Any other relevant information they wish the Office to consider.

8. The Respondent submitted their response vide a letter dated 27<sup>th</sup> February 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's averments that the Respondent unlawfully processed her minor's personal photos and used on their social media platform pages to market their services without her express consent.

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

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

11. The Complainant asserts that the Respondent collected and processed personal data (the Minor's images) without obtaining parent's informed consent, contrary to Section 25 of the Data Protection Act.

12. The Complainant contends that the Respondent failed to adhere to the principles of data protection, particularly lawfulness, fairness and transparency as required in Section 25(a) and (b).

13. The Complainant avers that her daughter being a minor enjoys special protections under the law and the unauthorized use of her images for commercial purposes contravenes Section 26 of the Act.

14. The Complainant further purports that Section 33 of the Data Protection Act mandates that parental or guardian consent be obtained before processing a minor's personal data, which was not done in this case.

15. In addition to the complaint, the complainants sought the following remedies.

1. Require the Respondent to promptly remove all images of the Minor from any online platforms where they have been published.

2. Provide compensation for the unauthorized commercial or promotional use of the Minor's image.
3. Ensure that the Respondent adheres to data protection regulations to prevent any future violations.
4. Implement any necessary enforcement actions or penalties against the Respondent for breaching data protection laws.

## ii. THE RESPONDENTS' RESPONSE

16. The Respondent submitted their response to the allegations vide a letter dated 27<sup>th</sup> February 2025.
17. In their response the Respondent acknowledges receiving of complaint regarding the alleged unauthorized use of the Complainant image on their Facebook page.
18. The Respondent asserts that they conducted internal investigations that revealed that the minor's photo was taken with her consent after she initiated orally that she was above 18 years at a Salon and did not have any objection to the taking of her photo and having the same posted.
19. Additionally, they assert that they have since taken the following remedial at the Facebook page where the same was posted.
20. That are still conducting a thorough investigation into how the image was sourced and whether proper licensing /permission were secured.
21. That they are revising their internal approval processes to ensure compliance with intellectual property and privacy rights moving forward.
22. The Respondent further averred that they were ready to tender a formal apology to the Complainant.

## F. ISSUES FOR DETERMINATION

23. In light of the above, the following issues fall for determination by this Office:
  - i. Whether the Respondent obtained express consent from the Complainant to process the minor's data for commercial purposes.

- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

**I. WHETHER THE RESPONDENT OBTAINED EXPRESS CONSENT FROM THE COMPLAINANT TO PROCESS THE MINOR'S DATA FOR COMMERCIAL PURPOSES.**

24. Section 27(a) of the Act provides that a right conferred on a data subject may be exercised where the data subject is a minor, by a person who has parental authority or by a guardian.
25. Section 33 of the Act provides for processing of personal data relating to a child. It provides that every data controller or data processor shall not process personal data relating to a child unless:
- a. Consent is given by the child's parent or guardian; and
  - b. The processing is in such a manner that protects and advances the rights and best interests of the child.
26. Moreover, Section 33(2) of the Act imposes a clear duty on data controllers and processors to incorporate appropriate mechanisms for age verification and consent before processing a child's personal data. This requirement ensures that data pertaining to minors is handled with special care and accountability. The Respondent failed to meet this legal standard and did not demonstrate that any such mechanisms were in place at the time the image was captured and published.
27. Section 32 of the Act further provides for conditions of consent whereby the 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. Consequently, the burden is on the Respondent to prove that they had consent from the Complainant to use the minor's image on their social media platform. The alleged implied consent by the minor as stated by the Respondent is legally ineffective under the Act.

28. On the issue of commercial use of personal data, the Act provides under Section 37 (1) (a) 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.
29. 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.
30. The Complainant adduced evidence to demonstrate that the Respondent used her minor's images on their social media platform to market the Respondent.
31. This Office therefore finds that as far as issue no (i) is concerned, the Respondent did not obtain express consent from the Complainant to process the minor's personal data for the commercial purposes.

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

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. The Complainant requested this Office to issue an award of compensation. 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.

34. 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.

35. In considering whether to issue compensation, this Office takes into consideration the use of Complainant's personal data for commercial purposes without consent.

36. In this context, the Respondent is hereby ordered to pay the Complainant **Kenya Shillings Seven Hundred Thousand (KES 700,000)** as compensation.

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

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

- i. The Respondent is hereby found liable for use of minor's image for commercial purposes without consent.
- ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Seven Hundred Thousand (KES 700,000)** 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 4<sup>th</sup> day of May 2025.



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

