



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0460 OF 2025

QUINCY JESSE KIPTOOCOMPLAINANT

-VERSUS-

MAGIC SLOTS LIMITED T/A CASINO FLAMINGO.....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 on 24th March 2025. He avers that he has been receiving promotional messages from the Respondent without his consent despite trying to opt out.

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 24th 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 12th May, 2025 and referenced ODPC/CIE/CON/2/1 (297). 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 could provide further details as regards to this complaint;
 - c. Details on how they obtained the Complainant's personal data;
 - d. A contractual agreement with the Complainant;
 - e. Whether the Complainant was notified and gave express consent for the use of his personal data for marketing purposes;
 - f. Any relevant materials in support of their response above;

- g. A detailed procedure on how data subjects can exercise their data protection rights;
 - h. Their data protection policy;
 - i. The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint does not take place again; and
 - j. Any other relevant information they wish the Office to consider.
8. On 24th May 2025, the Respondent submitted to the Office a Response to the Notification of Complaint.
9. On 20th June 2025, the Complainant submitted a rejoinder to the response.
10. Upon receipt of the aforementioned correspondences and documents, investigations were conducted as required by Regulation 13(1) of the Complaints Handling Procedures, 2021.
11. This determination is therefore as a result of analysis of the complaint as received and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

12. It is the Complainant's assertion that he has been receiving unsolicited promotional messages and calls from the Respondent despite multiple attempts to opt out of the same.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

13. The Complainant avers that he has never engaged in betting or gambling and does not frequent casinos in Nairobi or elsewhere. The Respondent's promotional messages were therefore entirely unwarranted and misdirected.
14. That on 18th December, 2024 he received a text from Flamingo Casino. The text was sent to his personal number which is 07*****31. This number is registered to his name and ID number.
15. That the text messages were promotional messages trying to induce him to gamble by asking whether he wants to become a millionaire.

16. That on 3rd February, 2025, he received a further text message from the Respondent promoting its trade which is gambling. Yet again on 8th February, 2025 he received a further text from the Respondent promoting its business.
17. That on 8th February, 2025, he executed opt out instructions to the effect that the said messages be stopped and he received a text stating that they had been stopped.
18. That the respondent sent another promotional text despite him opting out.
19. It was the complainant's contention that he has never consented to, nor expressed any wish to receive promotional messages from the Respondent. It was unclear how the Respondent obtained the Complainant's phone number which is personally identifiable, to use and send promotional messages.
20. The Complainant sought the following remedies from this Office:
- i) Immediate removal/deletion of the Complainant's personal details from all the Respondent's platforms.
 - ii) Compensation for a breach of privacy and violation of his personal data.
21. The Complainant provided screenshots of the promotional messages originating from the Respondent.

ii. THE RESPONDENTS' RESPONSE

22. The Respondents submitted a response to the notification dated 24th May 2025 in which they averred as follows;
23. That the said message that was sent to the Complainant through his alleged number was sent as a spam. Imperative to note that the message contained a click wrap agreement and blocking interface that was conspicuously positioned at the end of the message.
24. That the message provided sufficient information to notify the Complainant of the nature and kind of subsequent messages he would be receiving in the event they exercise the option of accepting to receive such messages. Further to the foregoing, the message contained a hyperlink that navigates a recipient to a webpage that provides clear, unambiguous identification of the sender, nature of business, physical address and offers the recipient the option to accept or decline

a digitally mediated policy. The link contained a "tap to load preview" that indicates that the message contained more information about the Sender.

25. That the message contained a blocking interface/feature that gave the Complainant the option to block receipt of the messages of that nature and from the already identifiable sender.

26. That further, the blocking interface provided the Complainant with a simple option of blocking messages of that nature from the same sender.

27. That the Complainant keyed in a different name of the sender that is Flamingo Casino which is not the same as FLAMINGO_KE to opt out from receiving the promotional messages.

28. That the opt-out process provided for was simple, visible, noticeable, straightforward, efficient, immediate, timely, free of charge and could be utilized at any time.

29. That it is evident that the Complainant opted out from a different sender being Flamingo Casino as opposed to FLAMINGO_KE.

iii. THE COMPLAINANT'S REJOINDER

30. The Complainant submitted a rejoinder dated 20th June 2025 in which he avers as follows;

31. That the first promotional message was not initially received as spam. Upon receiving it, he manually marked it as spam with the intention of preventing further similar messages from being delivered to him in the future. However, despite this action, he continued to receive subsequent promotional messages.

32. In order to document this persistent communication for evidentiary purposes, he later unmarked the initial message as spam so that he could retrieve and preserve it in the form of a screenshot. This explains why the message in question appears as "reported as not spam" it was initially marked, but subsequently reversed solely for the purpose of collecting proof for this complaint.

33. That the said message does not contain a shrink wrap agreement, and the burden lies with the Respondent to produce and annex such an agreement. Contrary to

the Respondent's assertions, clicking on the link provided in the message does not direct the user to a shrink wrap agreement, a contract, or even the Respondent's official website. Instead, it merely opens a WhatsApp channel titled "Flamingo Jackpot Westlands," which does not contain any contractual terms or conditions.

34. That the "Tap to Load Preview" function does not operate as intended. When one attempts to tap it, the message displayed is "Preview not available." As such, the link does not provide any accessible preview or further information regarding the alleged agreement or terms.

35. That some of the messages never had the tap to load preview.

36. That the Respondent has not demonstrated how they obtained his personal contact information, nor have they provided any evidence of his express consent to receive promotional messages from the Respondent. In the absence of such disclosure, the continued communication constitutes an unsolicited intrusion into his privacy.

37. That it is unreasonable and absurd for the Respondent to now suggest that he ought to have blocked them. He did not, at any point, provide the Respondent with his personal contact details. The Respondent failed to disclose the source of this information and has not annexed any form of express consent from him authorizing the receipt of such communications.

38. That he did, in fact, opt out of receiving the messages, as demonstrated in his claim. The Respondent's assertion that he failed to use the "correct name" in the opt-out request is yet another example of the evasive tactics employed. The opt-out mechanism should not be encumbered with technicalities or hidden complexities. In this case, the process is neither free nor straightforward, it consumes the recipient's mobile credit and requires undue precision, such as the inclusion of underscores and pseudonyms. This raises serious concerns about accessibility and fairness.

39. That if he, as a legal professional, found the mechanism difficult to interpret, it would be even more burdensome for an ordinary citizen, such as an elderly

person from a rural area. Such a convoluted opt-out process violates the fundamental requirement that opting out must be simple, accessible, and free of charge. It is, in effect, a deceptive practice aimed at frustrating the recipient's right to withdraw consent (which in his case was never obtained). It is therefore telling that the Respondent has not annexed any document to substantiate their claims, instead relying on vague and unsupported assertions.

40. That Regulation 16 of the Data Protection (General) Regulations, 2021, mandates that all direct marketing messages must contain an opt-out feature that is visible, clear, and easy to understand. The opt-out process must require minimal time and effort, must provide a direct and accessible communication channel, must be free of charge, and must be accessible to persons with disabilities.
41. That it is unacceptable for the Respondent to breach his rights and then suggest that he should visit their website or physical offices to "discuss" the matter. The violation should not have occurred in the first place. His right to privacy and data protection does not hinge on whether he physically presents himself at their offices. Moreover, the Respondent's argument is self-defeating as they claimed to have deleted his data without requiring his physical presence. This directly undermines their own position and exposes the lack of consistency and credibility in their defense.
42. That since filing this claim, he has continued to receive unsolicited promotional messages from the Respondent. This ongoing communication clearly demonstrates that his personal data has not been deleted, contrary to the Respondent's claims. There is no tangible evidence before this Tribunal to confirm that any deletion has in fact occurred. The mere assertion that his data was deleted is insufficient and lacks credibility in the absence of proper documentation, such as a data deletion confirmation notice or a system-generated audit trail. He filed before the Office further information highlighting this.
43. That as defined under the Data Protection Act, consent refers to any manifestation of express, unequivocal, free, specific, and informed indication of the data subject's wishes, either by a statement or by a clear affirmative action,

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signifying agreement to the processing of their personal data. He never provided the Respondent with this.

44. That he never expressly agreed to receive marketing messages. There was no clear affirmative action (like ticking a box, signing something, or clicking "I agree") on his part.
45. That he reiterates his complaint and asserts that he was never afforded the opportunity to give consent, raise an objection, or request the erasure of his personal data prior to its use for commercial purposes. The personal data in question is his phone number.
46. That section 37 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; has sought and obtained express consent from a data subject; or is authorized 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.
47. That no consent was sought from him.
48. That the Respondent failed to fulfill its obligations under the Act, violated his data protection rights, and should be held liable and ordered to compensate him.

F. INVESTIGATIONS UNDERTAKEN

49. The notice of site visit to the Respondent was issued on 11th June 2025 vide letter referenced ODPC/CIE/CON/2/1 (352). The site visit was conducted by Officers from the Office together with representatives from the Respondent.
50. During the site visit, the Respondent stated that the Complainant's data might have been collected years ago when it carried out online casino for its product.
51. The Respondent also stated that it had contracted a third party (onboarding company) during the period, who might have obtained the Complainant's data.
52. The Respondent failed to prove that indeed the Complainant consented to receiving the promotional messages.
53. It stated that the Complainant opted out from a different sender being Flamingo Casino as opposed to FLAMINGO-KE.

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G. ISSUES FOR DETERMINATION

54. 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.
- 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

28. Section 26(c) of the Act provides for the right to object to processing of personal data. Further Section 36 of the Act states that, "*a data subject has a right to object to the processing of their personal data, unless the data controller or data processor demonstrates compelling legitimate interest for the processing which overrides the data subject's interests, or for the establishment, exercise or defence of a legal claim.*"

29. Regulation 8 further specifies "*that a data Subject may request a data controller or processor not to process all or part of their personal data, for a specified purpose or in a specific manner.*"

30. It is worth noting that the right to object to processing is an **absolute right** where processing is for direct marketing purposes.

31. In this case, the Complainant exercised his right to object to the processing of his data, by following the steps provided for in the texts requiring the recipient to use the USSD code *456*9*5#.

32. The Respondent was obligated to honor the Complainant's request to cease processing her personal data. However, the Respondent disregarded this objection and continued to send messages.

33. Further, despite Respondent stating that the opt-out process provided for was simple, visible, noticeable, straightforward, efficient, immediate, timely, free of

charge and utilizable any time, the Complainant has still continued to receive promotional messages.

34. Based on the above, this Office concludes that the continued sending of messages, despite the Complainant's clear objections, constitutes a direct violation of the Complainant's right to object under Section 26 (c) of the Act.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

35. The Respondent is a data controller within the definitions of the Act and therefore has obligations pursuant to the Act.

36. Section 25 of the Act obligates every data controller or processor to process personal data in adherence to the set principles which includes inter alia;

- i. Processing in accordance with their right to privacy and
- ii. Process lawfully, fairly and in a transparent manner in relation to data subjects

37. It is evident from the screenshots provided by the Complainant that he has been receiving unsolicited marketing text messages from the Respondent regarding gambling without his consent.

38. The unsolicited promotional messages regarding gambling and betting with no prior consent or clear purpose explained to the Complainant, violate the principle of transparency and fairness. The failure to stop communication after utilization of the provided opt-out mechanism displays a lack of fairness in processing.

39. Furthermore, the Respondent did not inform the Complainant about the purpose of data collection or how his data was obtained, which contravenes the principle of transparency.

40. Section 30 of the Act stipulates 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. In this particular case, the Respondents processed the Complainant's personal data without obtaining consent from the Complainant as required under section 30 and 32 of the Act.

41. Furthermore, with regards to the unsolicited promotional messages, 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 has sought and obtained express consent from a data subject."*

42. The Office therefore finds that the Respondent did not fulfil its obligations under the Act.

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

42. 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.

43. 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.

44. 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.

45. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's right to object processing under Section 26(c) of the Act was infringed upon by the Respondent and use of the Complainant's data for commercial purposes.

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

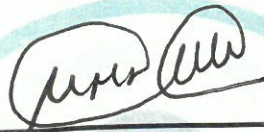
47. Having found that the Respondent failed to fulfill its obligations under the Act and attendant regulations, **an Enforcement Notice shall issue against the Respondent** pursuant to Section 58 of the Act and Regulation 16 of the Enforcement Regulations.

H. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable.
- ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Two Hundred and Fifty Thousand (KES 250,000)** as compensation.
- iii. An Enforcement Notice to hereby be 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 21st day of June 2025.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

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