



# OFFICE OF THE DATA PROTECTION COMMISSIONER

**ODPC COMPLAINT NO. 1724 OF 2025**

**IAN ITOLONDO MUTORO ..... COMPLAINANT**

**-VERSUS-**

**WAITHERA IMANI**

**ALIAS CERA IMANI**

**T/A ESHE COMMUNITY ..... 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 against the Respondent, alleging that the Respondent unlawfully collected, processed, and disclosed his personal data by publishing a promotional video on Instagram and TikTok featuring his full name and photograph without his knowledge or 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 6<sup>th</sup> November 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> December 2025 and referenced ODPC/CIE/CON/2/1 (927). In the Notification of the Complaint, the Respondents were informed that if the allegations by the Complainant were true, they were in violation of various provisions of the Act. Further, the Respondents were asked to provide this Office with the following:
  - a. A response to the allegations made against by the Complainant.
  - b. A contact person who can provide further details as regards to the Complaint.
  - c. Any relevant materials or evidence in support of the response.



- d. The lawful basis relied upon for processing the Complainant's personal data for marketing purposes.
  - e. An elaborate representation of how data subjects can exercise their rights in relation to data protection.
  - f. 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 does not take place again; and
  - g. Any other relevant information they wish the Office to consider.
8. The Respondent submitted a response to the notification.
  9. 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**

10. The complaint concerns the allegation that the Respondent unlawfully collected, processed, and disclosed his personal data by publishing a promotional video on Instagram and TikTok featuring his full name and photograph without his knowledge or consent.

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

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

11. The Complainant avers that on 23<sup>rd</sup> September 2025, the Respondent published a video on Instagram and TikTok promoting ESHE, which displayed the Complainant's full name and photograph.
12. The Complainant states that he did not at any time consent to the collection, use, or disclosure of his personal data for promotional or marketing purposes on social media platforms. However, the Respondent proceeded to process and publish his data without lawful authority.
13. The Complainant submits that the publication unlawfully associated him with a commercial product without his authorization and consequently created a misleading public impression that he had endorsed or was affiliated with ESHE.



14. The Complainant avers that, as a result, the disclosure caused him emotional distress and reputational harm. Moreover, his identity was exposed to the public in circumstances beyond his control.
15. Additionally, the Complainant states that the publication exposed him to risks of impersonation, misrepresentation, and further unauthorized use of his personal data by third parties.
16. Further, the Complainant submits that the Respondent's actions were unlawful and violated the principles of lawfulness, fairness, transparency, purpose limitation, and consent as provided under the Data Protection Act and the Data Protection (General) Regulations, 2021.
17. In addition to the complaint, the complainant sought the following redress;
- i. Immediate removal of the video and any related content containing his personal data.
  - ii. Investigation of the respondent for unlawful processing and disclosure of personal data.
  - iii. Enforcement action against the respondent under the Act.
  - iv. Compensation for emotional, reputational, and potential social harm suffered.
  - v. Preventive measures to avert recurrence of similar violations.
  - vi. Written confirmation from the Office upon completion of corrective action.

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

18. The Respondent submitted a response averring that that the individual referenced in the Complaint had, prior to the impugned publication, expressly consented to being featured on the ESHE digital application and in related promotional activities.
19. The Respondent states that, at the material time, the Complainant requested to be included on the application as a medical professional and, further, requested to receive referrals and client leads through the platform. Consequently, his inclusion was for purposes aligned with his own professional exposure and client acquisition.



20. The Respondent avers that the ESHE application is a publicly accessible platform available to users via the Apple App Store and Google Play Store, and therefore, visibility of professionals listed on the platform is inherent to its operation.
21. With respect to the impugned video, the Respondent states that the Complainant was aware of the content prior to publication. Additionally, the video was shared with him in advance and no objection was raised at that time. Moreover, the content was understood by both parties to be promotional in nature and consistent with the Complainant's request for visibility and clients through the platform.
22. The Respondent submits that the Complainant's professional information, including his name, photographs, and practice details, is publicly available through independent sources, including general internet search engines and publicly accessible professional listings. Accordingly, the Respondent did not introduce private or confidential data into the public domain.
23. The Respondent avers that, at no point, was there any intention to misuse personal data, cause distress, mislead the public, or infringe upon the Complainant's privacy or data protection rights. Rather, all processing was undertaken in the context of professional promotion requested by the Complainant himself.
24. Notwithstanding the foregoing, and without admission of liability, the Respondent states that it is willing to remove the referenced video and any related content from all platforms as a goodwill measure, solely to avoid further dispute and bring the matter to an amicable conclusion. However, this step is not an acknowledgment of wrongdoing.
25. Further, the Respondent avers that it continues to review and strengthen its internal processes on content approval, documentation of consent, and data protection compliance, so as to ensure clarity and prevent similar misunderstandings in the future.
26. The Respondent submits that, taken together:



- a. the Complainant had prior knowledge of and engagement with the platform and content;
- b. any appearance of his details was connected to his own request for professional exposure and client acquisition; and
- c. the proposed removal of the content sufficiently addresses the Complaint in a fair, reasonable, and proportionate manner.

27. Accordingly, the Respondent prays that the Office considers the foregoing in determining the matter and notes the Respondent's willingness to cooperate and comply with any further guidance the Office may issue.

### **iii. THE COMPLAINANT'S REJOINDER**

28. The Complainant avers that the Respondent has failed to demonstrate the existence of any explicit, informed, and voluntary consent for the use of his image and personal details in the promotional video published by ESHE. However, the Respondent merely alleges prior consent without producing any documented, verifiable, or auditable record to support such a claim.

29. He states that the Respondent's assertion that it is "reviewing and strengthening internal processes" relating to content approval, documentation of consent, and data protection compliance further confirms that, at the material time, its processes were inadequate and contributed directly to the misuse of the Complainant's personal data. Consequently, the Respondent cannot rely on post-incident improvements to sanitize unlawful processing that had already occurred.

30. Moreover, the Complainant avers that the lack of proper consent documentation and failure to comply with data protection standards occurred prior to the lodging of the Complaint. Accordingly, ESHE did not have clear, transparent, or effective mechanisms in place when the Complainant's data was used for marketing, and this omission materially contributed to the harm suffered.

31. The Complainant submits that, notwithstanding the Respondent's goodwill gestures, retrospective attempts at resolution do not address the core violation,



namely the unauthorized use of his personal data for promotional purposes without explicit consent. Further, internal reforms, while commendable for the future, do not absolve the Respondent from responsibility for emotional distress, reputational damage, and statutory breaches already occasioned.

32. On the right to object, the Complainant states that upon discovering the publication, he immediately contacted the ESHE Chief Growth Officer, to object to the processing and to request removal of the video. However, his objection was dismissed and the content remained accessible on TikTok and Instagram. Consequently, the Respondent disregarded the Complainant's statutory right to object to processing under the Data Protection Act, 2019.
33. Additionally, the Complainant avers that the continued availability of the video after his express objection aggravated the violation, as the Respondent failed to act promptly, transparently, or proportionately to limit further exposure of his personal data.
34. On the impact of the publication, the Complainant states that the TikTok and Instagram videos caused significant emotional and reputational harm. Moreover, persons who viewed the video approached him with inappropriate and uncomfortable commentary, resulting in embarrassment and psychological distress.
35. He submits that the video contained false and misleading statements, including an inappropriate, inaccurate and a misrepresentation of his professional role. Accordingly, the publication did not merely process data, but did so in a manner that distorted his identity and exposed him to ridicule and reputational injury.
36. Finally, the Complainant humbly submits that the Office considers this Rejoinder in its determination and takes appropriate action to vindicate the Complainant's rights under the Data Protection Act.

#### **F. ISSUES FOR DETERMINATION**

37. 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 her personal 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 HIS PERSONAL DATA FOR COMMERCIAL PURPOSES.**

38. The following questions will be answered in order to address the issue:

- a. *Whether the Respondent Obtained Valid Consent*
- b. *Whether the processing was for commercial purposes.*

*Whether the Respondent Obtained Valid Consent*

39. Section 2 of the Data Protection 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 relating to the data subject."

40. Section 30(1)(a) of the Act further 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.

41. Section 32(1) places the burden of proof on the data controller or processor to establish a data subject's consent for the processing of personal data for a specified purpose.

42. Regulation 4 of the Data Protection (General) Regulations, 2021 requires that, before processing, a controller or processor must inform the data subject of the purpose of processing, the type of personal data collected, the right to withdraw consent, and the implications of giving, withholding, or withdrawing consent. Regulation 4(3) further requires that such consent be voluntary and specific to the purpose of processing.

43. Applying the above law to the present matter, the Office observes that the Respondent alleges that the Complainant consented to being featured on the ESHE application and in promotional activities. However, the Respondent did

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not provide any documentary, verifiable, or auditable evidence demonstrating that the Complainant gave express, informed, and specific consent for the use of his name and image in social media promotional videos on TikTok and Instagram.

44. The Respondent's assertion of consent is therefore unsupported. In particular, the Office notes that consent to be listed on a digital application does not, without more, amount to consent for commercial advertising on external social media platforms. Each processing purpose requires distinct, specific, and informed consent.

45. Further, the Respondent's admission that it is "reviewing and strengthening internal processes relating to content approval, documentation of consent, and data protection compliance" confirms that, at the material time, its consent management practices were inadequate.

46. Accordingly, the Office finds that the Respondent failed to discharge the burden imposed under Section 32(1) of the Act, and therefore did not obtain valid consent for the promotional processing complained of.

*Whether the processing was for commercial purposes.*

47. Section 37(1)(a) of the Act provides that a person shall not use personal data for commercial purposes unless express consent has been obtained from the data subject.

48. Regulation 14(1) of the Data Protection (General) Regulations, 2021 provides that personal data is used for commercial purposes where it is processed to advance commercial or economic interests, including inducing persons to join, subscribe to, or obtain products or services, or to enable a commercial transaction.

49. In this matter, the Respondent published a video on TikTok and Instagram promoting ESHE while displaying the Complainant's full name and photograph.

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The purpose of the publication was to market the ESHE platform and attract users and clients.

50. The Office therefore finds that the Respondent used the Complainant's personal data for commercial and promotional purposes within the meaning of Section 37 and Regulation 14.

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

51. 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.

52. With regards to the award of compensation, Section 65 of the Act provides for compensation to data subjects and states, *"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."*

53. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent. In considering whether to issue compensation, this Office takes into consideration the fact that the Respondent used the Complainant's personal data for commercial purposes without consent.

54. The Respondent is hereby found liable for unlawfully processing and publishing the Complainant's name and image on TikTok and Instagram for promotional and commercial purposes without obtaining express, specific, and informed consent as required under the Data Protection Act. The Office hereby orders the Respondent to pay the Complainant **Kenya Shillings Fifty Thousand (KES. 50,000/=)** as compensation.

55. The Respondent is also directed to pull down the Complainant's personal data from the social networks and furnish proof of the same or an Enforcement Notice shall issue.

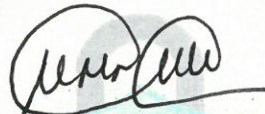


## G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable.
- ii. The Respondent is hereby ordered to pay the Complainant **Kenya Shillings Fifty thousand (KES. 50,000/=)** as compensation.
- iii. The Respondent is also directed to pull down the Complainant's personal data from the social networks with **Fourteen (14)** days and furnish proof of the same or an Enforcement Notice shall issue.
- iv. 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 February 2026.



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

