



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1672 OF 2025

CATHERINE WAIRIMU GABRIEL.....COMPLAINANT

-VERSUS-

PENDA HEALTH 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 Complainant lodged a complaint with the Office alleging that the Respondent used her personal data for promotional messages despite her not giving prior consent and opting-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 '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

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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 30th October 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 it *vide* a letter dated 17th December 2025 referenced ODPC/CIE/CON/2/1(947). 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) Provide any relevant materials or evidence in support of their response
 - d) Details on how they obtained the Complainant's personal data;
 - e) Whether the Complainant was notified and gave express consent for the use of her personal data for commercial purposes;



f) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;

g) Any other relevant information they wished the Office to consider.

8. On 22nd January 2026, the Respondent sent to the Office, a response to the Notification of Complaint.

9. This determination is therefore pursuant to the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021.

D. NATURE OF THE COMPLAINT

10. The Complainant alleged that the Respondent published and utilized his image on its social media platforms without his knowledge, consent, or any lawful justification.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

11. The Complainant avers that she received marketing and promotional communications from the Respondent. On 19th June 2024, she exercised her statutory right to object to the processing of her personal data for direct marketing purposes, which objection the Respondent acknowledged and apologized for.

12. Notwithstanding the foregoing, the Complainant contends that as at 7th August 2025, the Respondent continued to send unsolicited marketing communications to her personal telephone number.

13. The Complainant further alleges that the persistent transmission of unsolicited messages constitutes an unlawful interference with her right to privacy and has occasioned her inconvenience, distress, and anxiety. She asserts that the continued processing of her personal telephone number without her consent exposes her personal data to potential misuse and increases the risk of data breaches, spam, and fraudulent activity.

ii. RESPONDENT'S RESPONSE

14. The Respondent states that it did not unlawfully process the Complainant's personal data and explains that the Complainant was previously a subscriber to the Grace Health App, which it acquired in November 2023. It alleges that, following the acquisition, subscriber data was lawfully transferred to with the consents previously granted to Grace Health, thereby constituting a lawful basis for indirect collection and processing under section 28(2)(c) of the Act.
15. The Respondent claims that it contacted the Complainant on 17th June 2024 *via* WhatsApp to inform her that she could continue accessing similar reproductive health services through it. It further relies on section 32(2) and (3) of the Act to argue that although the Complainant withdrew consent on 19th June 2024, such withdrawal did not affect the lawfulness of processing carried out prior thereto, and that it duly apologized upon receiving the Complainant's objection.
16. The Respondent asserts that an additional single automated general check-in message sent on 30th October 2025 was the result of an operational error and was not intentional. It maintains that the message contained a formal opt-out mechanism and that the Complainant responded thereto, which triggered an automated follow-up message titled "*New Chat na Penda Consent*" seeking explicit consent in accordance with the Act's requirement for a clear affirmative action, and which also contained an opt-out mechanism.
17. The Respondent maintains that the Complainant did not expressly opt out by sending the word "STOP" or otherwise clearly communicate an intention to disengage, and that it was therefore reasonable to issue a follow-up message seeking explicit consent. It contends that both messages sent on 30th October 2025 were permissible under Regulation 15(1) of the Data Protection (General) Regulations, 2021, as the Complainant had previously consented, had been notified of the purpose of processing, and had been provided with a simplified opt-out mechanism.
18. The Respondent further states that it attempted to resolve the dispute amicably through a virtual meeting held on 14th January 2026, but the same was unsuccessful.

F. ISSUES FOR DETERMINATION

19. In light of the above, the complaint, the evidence adduced together with the investigations conducted, the following issues fall for determination by this Office:

- i. Whether the Respondent fulfilled the duty to notify.
- ii. Whether the Respondent processed the Complainant's personal data for commercial purposes in accordance with the Act and attendant Regulations.
- iii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENT FULFILLED THE DUTY TO NOTIFY

20. Section 29 of the Act imposes a mandatory obligation on a data controller or data processor to inform a data subject, before collecting or processing personal data and in so far as practicable, of specific information, including but not limited to: the purpose of processing, the rights of the data subject, third parties to whom the data may be transferred, security safeguards in place, whether provision of data is mandatory or voluntary, and the consequences of failure to provide such data.

21. The Respondent relies on the assertion that the Complainant was previously a subscriber to the Grace Health App and that her personal data was lawfully transferred following its acquisition of Grace Health in November 2023. The Respondent further contends that the consent previously granted to Grace Health constituted a lawful basis for indirect collection and subsequent processing under Section 28(2)(c) of the Act.

22. However, lawful acquisition of personal data through a corporate acquisition does not extinguish the independent and continuing obligation under Section 29 to notify the data subject. Upon acquiring the Complainant's personal data, the Respondent became a new data controller and was therefore required to inform the Complainant, in clear and unambiguous terms, of:

- i. the fact that her personal data was being processed by the Respondent;

- ii. the specific purpose for which it was being processed;
 - iii. her rights under Section 26 of the Act, including the right to object to direct marketing;
 - iv. the identity and contact details of the Respondent as the new data controller;
 - v. any third parties to whom the data would be disclosed; and
 - vi. the safeguards in place to protect her personal data.
23. The Respondent has not provided any evidence demonstrating that it furnished the Complainant with the full scope of information prescribed under Section 29. Its reliance on a single WhatsApp message dated 17th June 2024 informing the Complainant that she could "continue accessing similar reproductive health services" falls far short of the statutory threshold of notification. Such communication does not amount to meaningful notice as contemplated by the Act, as it neither enumerated the Complainant's rights nor disclosed the mandatory particulars required under Section 29 of the Act.
24. The Respondent's submission that subsequent messages sent on 30th October 2025 were permissible under Regulation 15(1) of the Data Protection (General) Regulations, 2021 is also untenable. Regulation 15(1) presupposes that the data subject has been duly notified of the purpose of processing and provided with a valid opportunity to opt out. In the absence of proof of compliance with Section 29, reliance on Regulation 15(1) is misplaced.
25. Moreover, the characterization of one of the messages as an 'operational error' does not absolve the Respondent from its statutory obligations. The duty to notify is proactive and continuous and cannot be satisfied retroactively through automated follow-up messages seeking consent after unsolicited communication has already been transmitted.
26. In light of the foregoing, it is evident that the Respondent did not fulfil its duty to notify the Complainant in accordance with Section 29 of the Act. The Respondent failed to demonstrate that, upon acquiring the Complainant's personal data, it provided the mandatory information required.

27. Accordingly, the Office finds that Respondent failed to fulfil its duty to notify under Section 29 of the Act.

II. WHETHER THE RESPONDENT PROCESSED THE COMPLAINANT'S PERSONAL DATA FOR COMMERCIAL PURPOSES IN ACCORDANCE WITH THE ACT AND ATTENDANT REGULATIONS.

28. 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.

29. 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)

30. 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 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."

31. 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.

32. It is undisputed that the Respondent sent marketing messages to the Complainant to promote and market its services. Whether directly or indirectly the marketing messages are intended to induce one to buy, join and or subscribe to services. As such, the marketing messages sent to the Complainant were being used to advance the Respondent's commercial and economic interests. This constituted the use of personal data for commercial purposes which required express consent.

33. Further, consent can only 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. The Respondent having relied on consent as a lawful basis for processing the Complainant's personal data for marketing purposes did not furnish the Office with evidence of consent given by the Complainant. As such the Respondent failed to demonstrate that indeed the Complainant expressly consented to the use of her personal data for direct marketing.

34. From the above, 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 personal data for commercial purposes.

35. This Office therefore finds that as far as issue no (ii) is concerned, the Respondent did not obtain the requisite consent required by the Act to use the Complainant's personal data for commercial purposes.

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

36. 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.

37. Having considered the merits of the complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent unlawfully processed the Complainant's personal data without express consent, it therefore, follows that there has been a violation of the Act by the Respondent.
38. 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.
39. 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.
40. The Respondent is hereby directed to compensate the Complainant in the sum of **Kenya Shillings Fifty Thousand (KES 50,000)** for failure to fulfil the duty to notify. In arriving at this award, this Office has taken into account the nature and extent of the violation, the number of messages sent to the Complainant and the conduct of the Respondent, including attempts to settle the matter amicably.

G. FINAL DETERMINATION

41. In the ultimate, the Data Commissioner makes the following final determination;
- i. The Respondent is hereby found liable.
 - ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Fifty Thousand (KES 50,000)** 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 28th day of January 2026



IMMACULATE KASSAIT, SC, MBS
DATA COMMISSIONER

