



**OFFICE OF THE DATA PROTECTION COMMISSIONER  
ODPC COMPLAINT NO. 0583 OF 2023**

**DOUGLAS MUIRURI MBUGUA..... COMPLAINANT**

**-VERSUS-**

**STANDARD CHARTERED BANK KENYA LIMITED.....RESPONDENT**

**DETERMINATION**

*(Pursuant to Section 8 (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 Constitution of Kenya 2010, under Article 31 (c) and (d) 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.
2. Section 8 (f) of the Act provides that the Office of the Data Protection Commissioner (hereinafter known as 'the Office') can receive and investigate any complaint by any person on infringements of the rights under the Act. Furthermore, Section 56 (1) 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.
3. 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. It is on that basis that, the Office received a complaint dated 16<sup>th</sup> April, 2023 pursuant to Section 56 of the Act and Regulation 14 of the Data Protection

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(Complaints Handling Procedure and Enforcement) Regulations, 2021 ('the Regulations') from the Complainant who was an aggrieved data subject.

5. The Respondent is a commercial Bank in Kenya and the Complainant was an employee at the Bank from 21<sup>st</sup> September, 2015 until 10<sup>th</sup> March, 2022 when his employment was terminated.
6. Pursuant to Regulation 11 of the Regulations, the Office, notified the Respondent of the complaints filed against them vide a letter dated 15<sup>th</sup> June, 2023 referenced ODPC/CONF/1/5 VOL 1 (297) and required their response within 21 days. Upon receipt of the responses, the Office conducted investigations as required by Regulation 13 (1)(d) of the Regulations.
7. This determination is therefore as a result of analysis of the complaint as received, the responses from the Respondent and investigations conducted by the Office.

## **B. NATURE OF THE COMPLAINT**

8. The Complainant was an employee of the Respondent and was terminated on allegations of corruption.
9. The Complainant alleged that the Respondent obtained and recorded a telephone conversation between himself and another person which formed the basis of the termination of his employment.
10. He alleged that the Respondent mishandled his personally identifiable data by recording him without his consent and used the information to terminate his employment.
11. The Complainant alleged that the actions of the Respondent infringed his rights as a data subject as per Section 26 of the Act. He also alleged that the Respondent breached Section 29 and 30 of the Act hence forming the basis of his complaint lodged with this Office.

## **C. ANALYSIS OF EVIDENCE ADDUCED**

### **I. THE COMPLAINANT'S EVIDENCE**

12. The Complainant filled the complaint's form and stated that he was not informed on the capture and use of his personal data or given an option of objecting to the processing contrary to Section 26 and 29 of the Act.

13. The Complainant also indicated that the Respondent processed his personal data without his consent contrary to Section 30 of the Act leading to the loss of his employment, physical and psychological trauma.

14. Vide an email dated 22<sup>nd</sup> May, 2023, the Complainant was requested to provide the Office with more information relating to the complaint, particularly:

- i. a more detailed description of the nature of his complaint;
- ii. details of how the breach occurred; and
- iii. any other relevant information that could assist in carrying out investigations into the complaint.

15. The Complainant responded to the above request vide an email dated 26<sup>th</sup> May 2023 and stated that:

- i. He was an employee at the Respondent Bank since 2015 and his employment contract was terminated on false allegations of corruption. These acts infringed on his rights as defined under Section 26 of the Act.
- ii. The breach occurred from the acts of his former employer being a data controller and a data processor mishandling his personally identifiable data by setting a trap and recording without his consent or permission and used the illegally obtained information to terminate his employment contract.
- iii. The Respondent breached Section 29 of the Act on their obligations as a data controller and data processor.
- iv. The Respondent breached Section 30 of the Act as no consent was sought from the Complainant prior to processing his data and therefore the Respondent committed an offence.

16. The Complainant provided the following documents as part of his evidence:

- i. A forensic report ("the report") done by Equinox Forensic Services, dated 21<sup>st</sup> February 2023 and referenced EFS/F/R/02/23/005, on the alleged breach and a forwarding letter with recommendations;
- i. Letter of termination of his employment contract dated 10<sup>th</sup> March 2022;
- ii. Witness statement by [REDACTED] dated 15<sup>th</sup> May 2023; and
- iii. Witness statement by Mr [REDACTED] dated 25<sup>th</sup> August 2022.

17. Relevant to this complaint is part of pages 7 – 8 of the report which speaks to the phone recordings having been an act contrary to the provisions of the Data

Protection Act. In the report, it is stated that the actions infringed on the Complainant's rights under Section 26 of the Act, that the Respondent breached section 29 and 30 of the Act.

18. The letter of termination of the Complainant's employment was provided to prove that his employment was terminated for gross misconduct and this evidence was to demonstrate that the actions of the Respondent in recording his telephone conversations led to his termination.
19. In Mr. [REDACTED]'s statement, he confirms that the Complainant called him on his recorded device. He stated that in his position, his telephone conversations are recorded for record keeping and as a regulatory requirement for the Respondent Bank.
20. Mr. [REDACTED]'s statement was not relevant to this Office's investigations regarding the alleged infringement of the Complainant's rights as a data subject under the Act.

## **II. THE RESPONDENT'S EVIDENCE**

21. The Respondent provided a response to the Notification of Complaint vide a letter dated 29<sup>th</sup> June, 2023.
22. In the Notification of Complaint Letter, the Office directed the Respondent to provide relevant material in support of their response. The Respondent provided the following documents to the Office for consideration:
  - i. Copy of the signed employment contract for the complainant;
  - ii. FM and TM Telephone and Electronic Communications Usage and Recording Standard;
  - iii. Group Speaking Up Policy
  - iv. Group Speaking Up Standard; and
  - v. Group Investigations Standard.
23. In its response, the Respondent indicated that the Complainant was informed through his employment contract that the Bank collects personal data through the Group's telephone systems which are monitored. The personal data collected in this instance is a telephone conversation recording involving the Complainant which was recorded when he called an official of the Bank through a recorded line which is guided by the Bank's internal procedures and controls.
24. The Respondent indicated that vide a court order dated 17<sup>th</sup> May 2023, the Milimani Employment & Labour Relations Court directed that the telephone

recording in question be filed in court as evidence. The Complainant did not protest the said directive as being an infringement on his right to privacy and neither did the court deem the recording to be a violation of the Complainant's rights. The Respondent was guided by the said court order and in doing so, the telephone conversation became a matter of public record.

25. The Respondent stated that the Complainant's information was processed as a result of the controls that they have put in place to monitor business conducted on the company's communication lines. The Respondent relied on Section 36 of the Act which 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*** (emphasis mine).
26. The conversation between the Complainant and the Bank's official was of interest with regard to an internal investigation on a matter brought to the Respondent's attention in line with their Speaking Up Policy and the Speaking Up Standard. Therefore, the Respondent processed the information as a result of the compelling legitimate interest.
27. Additionally, the Complainant had acknowledged the processing of this data by signing his employment contract that all the Bank's computer and telephone systems provided for business purposes may be monitored.
28. In its response, the Respondent relied on several sections of the said employment contract between themselves and the Complainant. The contract was signed by the Complainant on 19<sup>th</sup> August, 2015 and witnessed on the same date.
29. The Respondent pointed out Section 20 of the said contract which provides for "**Monitoring Practices and Use of the Group's Systems**". Specifically, the agreement envisages that:
- "By signing this Agreement, you acknowledge that access to the Group's computer and telephone systems is provided for business purposes and may be monitored to protect its legitimate business interests, comply with legal and regulatory obligations and ensure compliance with Company and Bank rules."*
30. All employees acknowledge the above provision by signing their employment contract. The Complainant was not an exception as he was aware of the provision of his employment contract which he signed on 19<sup>th</sup> August, 2015.

31. On the issue of consent, the Respondent stated that by signing of his employment contract which provided that all the Bank's computer and telephone systems provided for business purposes may be monitored. Additionally, they relied on section 25.1 of the employment contract which states that:

*"You consent to the company and the Bank to process your personal data for the purposes of and in connection with your employment, for the Bank's business and administrative purposes and for purposes of complying with applicable laws, regulations and procedures..."*

32. In response to how they collected, stored and processed the Complainant's data, the Respondent stated that his information was collected via the Bank telephone recorded lines following a call the Complainant placed to a Bank official on a recorded line.

33. On storage, the Respondent stated that information collected to support the recording of telephone conversations and electronic communications is retained and stored in a manner that meet legal requirements and is in line with the Group and Country Records Retention and Destruction schedules.

34. With regards to processing of the recorded conversation, the Respondent stated that it was used as evidence during the investigation process in line with their policies and standards.

35. The Respondent, in responding to whether they had a legal basis to process the Complainant's personal data, they stated that they had a legitimate interest in processing of the Complainant's telephone conversation in line with their obligation to accord him a fair hearing before termination of his employment.

36. The Office directed that the Respondent demonstrates that they fulfilled the duty to notify the Complainant of the use of his personal data as per Section 29 of the Act. They indicated in their response that they complied through the employment contract where the Complainant was made aware that the Bank collects personal data through the Group's telephone systems which are monitored hence, they fulfilled the duty as provided under the Act.

37. The Notification Letter directed the Respondent to demonstrate how the Bank balances the rights and freedoms of the data subjects vis-à-vis their internal policies and procedures. They provided the Group Investigation Standard which provides for mandatory processes to ensure privacy rights of the data subject are not infringed. Particularly, these mandatory processes include conducting interviews, reasonable, proportionate record keeping and confidentiality.

38. The mitigation measures that the Respondent alluded to in their response include training and awareness sessions around data privacy and ensuring that all their employees recommit on an annual basis to the Group Code of Conduct.
39. On their level of compliance, the Respondent indicated that they are registered as a data controller and data processor with this Office. Additionally, they have drafted and operationalised a Data Subject Access Rights Process which sets the standard process that the Bank adopts in fulfilling data subjects' requests.
40. In addition to the aforementioned documents, the Respondent provided the following policies and standards in response to their level of compliance:
- i. SCB Group Privacy Standard;
  - ii. The Group Privacy Standard Country Addendum – Kenya;
  - iii. The SCB Kenya Data Subject Access Rights Procedure;
  - iv. The SCB Kenya Complaints Handling Department Operating Instructions; and
  - v. The updated Standard Chartered Bank Kenya website privacy statement.

#### **D. ISSUES FOR DETERMINATION**

41. Having considered the nature of the complaint, and the evidence adduced by all parties to the complaint, the following are the issues for determination of this complaint:
- i. Whether the Respondent breached the Complainant's rights under the Act;
  - ii. Whether the Respondent fulfilled the duty to notify under section 29 of the Act; and
  - iii. Whether there was any legal basis relied upon to process the Complainant's telephone conversation recordings as per Section 30 of the Act.

#### **I. WHETHER THE RESPONDENT BREACHED THE COMPLAINANT'S RIGHTS UNDER THE ACT**

42. Section 26 of the Act provides for the rights of a data subject. Relevant to this complaint is the right to be informed of the use to which their personal data is to be put and to object to the processing of all or part of their personal data.
43. The Complainant alleged that the Respondent's actions infringed on his rights as a data subject. The Complainant was informed of the use to which is personal

data was to be used by acknowledging and signing his employment contract therefore this right under Section 26 was upheld by the Respondent.

44. Additionally, as per Section 36 of the Act, data subject has the right to object to the process of their personal data. However, the Act provides an exemption to this right in that whenever a data controller demonstrated compelling legitimate interest for the processing, then this interest overrides the data subject's interests.
45. The Respondent demonstrated that it had compelling interest to process the telephone conversation involving the Complainant and another Bank official. This interest is also anchored on the contractual relationship between the Complainant and the Respondent. The employment contract indicates that access to the Group's computer and telephone systems may be monitored to protect the Respondent's legitimate business interests.
46. Additionally, the Respondent was conducting internal investigations into an allegation and therefore had to use the recording in this manner. This interest overrides the Complainant's interest to object to the processing of that telephone conversation.
47. The Respondent also obtained a court order to file the telephone conversation as evidence in an ongoing case.
48. The Complainant's rights were not breached by the Respondent as he was informed to the use of his personal data via the employment contract and there was compelling legitimate interest to process the telephone conversation in question.

## **II. WHETHER THE RESPONDENT FULFILLED THE DUTY TO NOTIFY UNDER SECTION 29 OF THE ACT**

49. As aforementioned, Section 29 of the Act places an obligation on data controllers to, *inter alia*, before collecting personal data, inform the data subject of their rights under section 26, the fact that personal data is being collected and the purpose for which the personal data is being collected.
50. The Complainant was an employee of the Respondent and there was an employment contract in place between the parties. The said contract indicated the monitoring practices and use of the group's systems and consent to the processing of employee personal data for purposes of and in connection with their employment.





51. This therefore indicates that the Respondent duly informed the Complainant that his personal data will be collected and the purpose for which his data will be collected. In his complaint, the Complainant indicated that the Respondent breached Section 29 of the Data Protection Act but failed to demonstrate the manner in which the breach occurred.
52. By having the employment contract in place and signed by the Complainant, the Respondent fulfilled its duty to notify and inform the Complainant as per Section 29 of the Act.

**III. WHETHER THERE WAS ANY LEGAL BASIS RELIED UPON TO PROCESS THE COMPLAINANT'S TELEPHONE CONVERSATION RECORDINGS AS PER SECTION 30 OF THE ACT.**

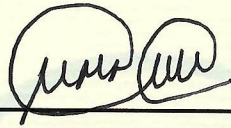
53. The right to privacy as envisaged under Article 31 (c) and (d) of the Constitution is not an absolute right and therefore can be limited for certain reasons such as fulfilment of a court order or enforcement of a legally binding agreement. This is the purpose of section 30 of the Act and other provisions with exemptions as to the processing of personal data by data controllers and data processors.
54. Section 30 of the Act provides for the lawful processing of personal data. Specifically, subsection 1 provides that a data controller shall not process personal data unless the data subject *consents* to the processing for one or more specified purposes or, processing is *necessary for the performance of a contract to which the data subject is a party* (emphasis mine).
55. The employment contract forms the legal basis for processing of the Complainant's data. The consent is specifically stated in clause 25 of the contract as has been analysed above. The processing of the Complainant's personal data was necessary to enforce the provisions of the said employment contract.
56. Additionally, as analysed above, there was legitimate interest to process the Complainant's telephone conversation as directed by the court order and based on the employment contract between the Complainant and the Respondent.
57. Therefore, the Respondent has demonstrated that there was a legal basis to process the Complainant's telephone recordings as per the Act.

**E. FINAL DETERMINATION**

58. In consideration of all the facts of the complaint and evidence tendered, the Data Commissioner makes the following determination:

- i. The Respondent did not breach the Complainant's rights under the Act;
- ii. The Respondent demonstrated that they fulfilled the duty to notify under Section 29 of the Act;
- iii. The Respondent demonstrated the legal basis relied upon to process personal data as per Section 30 of the Act.

DATED at **NAIROBI** this 14<sup>th</sup> day of July 2023.



**Immaculate Kassait, MBS**  
**DATA COMMISSIONER**