



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0586 OF 2023

HARRISON KISAKA.....COMPLAINANT

-VERSUS-

FAULU MICROFINANCE BANK LIMITED.....RESPONDENT

DETERMINATION

(Pursuant to Section 8(f), 56 and 57 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 recognizes the right to privacy. Consequently, in an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter "the Act") was enacted. Section 8 (1) (f) 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) 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.
2. The Office of the Data Protection Commissioner (hereinafter as "the Office") is a regulatory Office, established pursuant to the Data Protection Act, 2019. The Office 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.

3. On 17th April 2023, this Office received a complaint from one Harrison Kisaka regarding the negative use of his personal data in discriminating him from accessing a job opportunity. Consequently, he seeks to access the said personal data that led to his disqualification from the employment opportunity.
4. On 29th May 2023, the Office in the exercise of its mandate as envisaged under the Act and in the promotion of justice, notified the Respondent of the complaint filed against it. In the notification of the complaint filed against the Respondent, the Respondent was to provide: -
 - a) A response to the allegations made against it by the Complainant;
 - b) Any relevant materials or evidence in support of the Response in (a) above;
 - c) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant;
 - d) Faulu Bank's data protection policy outlining the complaints handling mechanisms to deal with matters relating to the rights of a data subject under the Act, the Regulations, and any other alleged contravention directed to its attention by data subjects;
 - e) Details of Faulu Bank's level of accuracy while retaining personal data; and
 - f) Demonstration (by way of a written statement) of its level of compliance with the requirements under the Act and the Regulations. In particular, an elaborate representation of how data subjects can exercise their rights in relation to data protection.
5. On 14th June 2023, this office sent a reminder to the Respondent through letter ref no. ODPC/CONF/1/5/Vol 1(294), advising it to respond to the complaint. The Respondent submitted its response on 15th June 2023, through a letter dated 13th June 2023, and the enclosures thereto. Upon receipt of the response, investigations were conducted as required by Regulation 13 (1) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations 2021.
6. This determination is pegged on the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations 2021 which states that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

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B. NATURE OF THE COMPLAINT

7. The complaint relates to the right to access of personal data wherein the Complainant alleges that the Respondent refused to give him forms that contained his personal data which had been processed after he attended an interview at the Respondent Microfinance Bank.
8. Further, the complainant claims that he was interviewed twice by the Respondent and he qualified as the best applicant for the position. During the interviewing process, he signed a consent form authorizing the Respondent to run background checks on him. The Complainant also claims that the consent forms explicitly specified that he could have a copy of the processed data as well as the source.
9. He contended that the processed data had been used against his selection and it was therefore in his best interest to access a copy of the processed data and the source to enable him to follow up for resolution.
10. The complainant went to the Respondent's head office on 17th April 2023 and spoke to the Respondent's Human Resource Officer. The Complainant claims he could not access a copy of the processed data nor the source as he was told by the Human Resource Officer that it is private information.

C. THE RESPONDENT'S RESPONSE TO THE COMPLAINT

11. The response to the complaint was made vide a letter dated 13th June 2023 that was received on 15th June 2023. The Respondent confirmed receipt of the complaint notification dated 29th May.
12. The Respondent claims that on or about March 2023, it put up an advertisement through its group company's website Old Mutual Limited seeking to fill the vacancy for the position of Credit Quality Assurance & Compliance Officer, to which the complainant duly applied and was shortlisted. The complainant was invited for an interview on 15th March 2023 and a 2nd level interview on 23rd March 2023. The complainant emerged as a successful candidate.
13. The Respondent averred that on 28th March it informed the Complainant that he was the successful candidate and sent him a consent form requesting to carry out background checks.
14. The Respondent further averred that the Complainant executed, scanned, and sent the consent form back on the same date, and thereafter the Respondent issued

the Complainant an official letter of intent of employment subject to verifications being conducted including but not limited to authentication of the complainant's academic certificates and vetting of his character and reputation. The Respondent enclosed a copy of the executed and scanned consent form and a copy of the letter of intent.

15. The Respondent averred that it conducted background checks which generated an adverse report on the character of the complainant which prevented the Respondent in line with its policies and procedures to extend a full offer of employment to the Complainant.
16. The Respondent averred that it informed the complainant through a standard decline email dated 15th April 2022 that it had sought to decline an offer of employment to him owing to a negative background check.
17. The Respondent further averred that the complainant visited the Bank on 17th April 2023 and had a brief engagement with a staff member who informed him that he had received an adverse report relating to his character.
18. The Respondent further stated that the Complainant became aggressive during the meeting and insisted to be provided with a written report and threatened legal action against the Respondent, causing the Respondent to cease all communications with the Complainant.
19. The Respondent averred that the adverse report related to the non-disclosure of material facts to the Bank, that is, the existence of an ongoing criminal case number [REDACTED] Republic vs. Harrison Kisaka, conspiracy to defraud contrary to section 317 of the Penal Code.
20. The Respondent further averred that the matter uncovered was well within the knowledge of the complainant and in the public knowledge, hence, there was no physical report to give.
21. The Respondent produced a sample copy of a consent form, a scanned copy of the duly executed scanned form, a copy of the letter of intent, and a copy of the application for employment form in support of the response.
22. The Respondent stated that it has worked to set up a data protection framework that seeks to protect the rights of the data subject. The Respondent went ahead and produced the company's data protection policy, protection process, and

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procedure manual, data privacy poster that is available in its branches, and the data subject request form.

D. ISSUE FOR DETERMINATION

- i. Whether there was any infringement of the Complainant's right as a data subject as provided for in the Data Protection Act, 2019.

E. ANALYSIS AND DETERMINATION

I. WHETHER THERE WAS ANY INFRINGEMENT OF THE COMPLAINANT'S RIGHTS AS DATA SUBJECTS

23. The office notes that Complaint relates to the access by the Complainant of the report emanating from the background checks that the Respondent conducted on the Respondent after being a successful interviewee for the position of Credit Quality Assurance & Compliance officer. Upon being successful in the interview, the Complainant consented to background checks to be conducted on him by the Respondent. Upon conducting the background checks an allegedly adverse report against the Complainant was reached at. Upon reaching the adverse report on the Complainant, the Respondent stopped processing the Complainant's appointment. Upon revocation of the appointment by the Respondent, the Complainant requested for the adverse report to be availed to him. He even went to the Respondent's office for the same to be availed to him.

24. From the above, the following pertinent question arises:

Does the purported adverse report emanating from the background checks constitute the Complainant's personal data;

25. To answer this question, the definition of personal data is crucial. Section 2 of the Data Protection Act, 2019 (the 'Act') defines **Personal Data** as ***"any information relating to an identified or identifiable natural person."*** The act also defines an 'identifiable natural person' as ***a person who can be identified directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social or social identity.*** From these definitions of the Act, it is evident that personal data is any information relating to any person who can be identified directly or indirectly through the identifiers stated above.

Essentially if we use the complainant's name (Harrison Kisaka) as an identifier, any information relating to him constitutes personal data.

26. This definition has been appropriately used by the Respondent in its consent to carry out the Background/ Reference checks form wherein it states that personal data is information relating to an individual ('you' or 'your').
27. Having established that any information relating to the Complainant constitutes personal data it therefore follows that the background/ reference checks report relating to the Complainant constituted personal data. The background checks were being conducted with the aim to extract information relating to the Complainant which constituted personal data.
28. At all material times when the complainant signed and or executed the 'Consent to carry out background/ reference checks' form, he consented not only to the use of his personal data by the Respondent to conduct the background checks/ references but also for the Respondent to collect his personal data indirectly from other sources. This is in line with section 28 (2) (c) which states that ***'personal data may be collected indirectly where the data subject has consented to the collection from another source'***.
29. Having answered the above question to the affirmative, this office will now dwell on the issue at hand i.e. whether there was any infringement of the Complainant's rights as a data subject.
30. Section 26 of the Data Protection Act, 2019 provides for the rights of a data subject. It provides that: ***"A data subject has a right:***
 - a) To be informed of the use to which their personal data is to be put;***
 - b) To access their personal data in the custody of data controller or data processor; (emphasis mine)***
 - c)***
31. Regulation 9 (1) (e) of the Data Protection (General) Regulations, 2021, provides that ***"A data subject has a right to obtain from the data controller or data processor confirmation as to whether or not personal data concerning them is being processed, and, where that is the case, access to the personal data and the information as to— where the personal data is not collected from the data subject, any available information as to the source of collection."***

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32. Further, Regulation 9 (3) of the Data Protection (General) Regulations, 2021 states as follows:

A data controller or data processor shall—

(a) on request, provide access to a data subject of their personal data in its possession;

(b) put in place mechanisms to enable a data subject to proactively access or examine their personal data; or

(c) provide the data subject with a copy of their personal data.

33. From the complaint brought to the Office, the Complainant alleged that the Respondent had denied him access to his personal data in the form of a report that emanated after the background checks were conducted on the Respondent. This was confirmed by the Respondent who stated that the Complainant being dissatisfied with the Respondent's decline e-mail visited the Respondent's premises to seek further clarification. The Complainant also sought that he be given the written report relating to him. As already stated earlier in this determination, the report constituted the Complainant's personal data, and as such he had the right to access it.

34. Further, a look at the duly executed consent form provided for the rights of the Complainant regarding his personal data. Paragraph 4 (i) of the consent form provides as follows:

" YOUR RIGHTS

In line with the Data Protection Act 2019 and other applicable law, regulations, industry guidelines, you have the following rights regarding your personal data:

(i) Access: To request a copy of the personal data processed in relation to you by filing in a request form at Human Capital. The Human Capital team shall guide you on the expected time taken to access your personal data.

35. As it can be seen from the consent form the complainant was informed of his right prior to him signing the consent form. He understood from the onset that he could access a copy of the personal data. Upon execution of the consent form, he had a legitimate expectation that upon exercising his right to access the Respondent will comply and will give him the alleged adverse report against him. The right to access is absolute.

36. From the foregoing, it is evident that the Respondent processed the personal data of the Complainant while conducting a background check on him. The Respondent

had an obligation to provide the Complainant access to his personal data in the form of the purported adverse report against the Complainant.

37. It is therefore our finding that the right of the Complainant to access his personal data was violated and as such the Respondent is found liable for violation of the Complainant's rights.

F. FINAL DETERMINATION

38. In consideration of all the facts of the complaint and evidence tendered, the Data Commissioner makes the following final determination;

- i. The Complainant's right to access personal data has been violated.
- ii. The Respondent is hereby directed to send and or avail to the Complainant the requested report within **7 (seven) days** from the date hereof and notify this office of the same.
- iii. In the event of failure to adhere to (ii) above, an Enforcement Notice is to be issued.
- iv. Parties have the right to appeal this determination to the High Court of Kenya.

DATED at NAIROBI this 7th day of July 2023.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**