REPUBLIC OF KENYA

OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0646 OF 2023 AS CONSOLIDATED WITH ODPC COMPLAINT NO 0719 OF 2023

ERIC MIGWI.....1ST COMPLAINANT

SCHOLASTICA ONON.....2ND COMPLAINANT

-VERSUS-

WHITEPATH COMPANY 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 24th April 2023, this Office received a complaint from Eric Migwi (1st Complainant) against Whitepath Company Limited (Respondent). Similarly, on 3rd June 2023, this office further received a complaint from Scholastica Onon (2nd Complainant) against the Respondent.

4. On 13th June 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) A standard contract that the Respondent has between itself and the Complainants, if any

   c) Details of how the Respondent obtained the contacts in the digital borrower's phone books, and whether the digital borrowers consented to access their phone book contacts;

   d) The legal basis relied upon to disclose the complainant's personal private information to third parties obtained in her phone book contacts;

   e) The legal basis on which the Respondent relies to disclose the complainant's personal private information to third parties obtained in the Complainant's phone book contacts;

   f) Proof of registration with this office as data controllers and data processors;

   g) The technological and organizational safeguards that have been put in place to ensure that such occurrence mentioned in the complaint do not take place again;

   h) The Respondent'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;

   i) 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 27th June 2023, the Respondent filed its response to the complaint filed against it.

6. 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.

7. 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.

B. NATURE OF THE COMPLAINT

8. The Complainants alleged that they have been receiving incessant messages from the Respondent demanding payment from them as guarantors of loans which they know nothing of. They further aver that they were not contacted in order to consent as being guarantors to the said loan applicants by the Respondent.

C. THE RESPONDENT'S RESPONSE TO THE COMPLAINT

9. The response to the complaint was made vide a letter that was received and filed on 27th June 2023. The letter contained the Respondent's substantive response to the Notification letter.

10. The Respondent did not provide a response to the 1st complainant's complaint despite being notified of the same.

11. As regards the 2nd Complainant, the Respondent stated that the 2nd Complainant is a guarantor to one of the Respondent's borrowers. The Respondent avers that the 2nd Complainant has been listed as an emergency contact to a loanee by the name of Anthony Mbatha who had applied for a loan from the Respondent and listed her as an emergency contact. That the 2nd Complainant was notified of the nomination as an emergency contact and did not opt-out, hence consenting to the nomination. The Respondent further averred that the loanee whom the

Complainant had guaranteed had defaulted in repaying a number of the loans and as such the 2nd Complainant being a guarantor was contacted.

12. In order to clear the way for the complaints to be resolved, the Respondent added that it has stopped addressing the 2nd Complainant about collecting the unpaid loans. The Respondent additionally asserted that they had engaged the Complainant to mediate the dispute and that she had asked for her lawyer to handle it.

13. In addition, the Respondent averred that prior to the collection of information from the data subjects, each data subject is prompted to accept or decline the consent. On permissions, the data subject is prompted with the request to allow for permissions.

14. Further, the Respondent avers that generally by accepting their privacy policy, the data subjects acknowledge that they have read and understood the privacy policy and accept all of its terms. That in particular, they agree and consent to the Respondent collecting, using, storing, transferring, or otherwise processing their personal information in accordance with the privacy policy.

15. Consequently, the Respondent avers that they process everything in accordance with their privacy policy and that their company does not use their customers' phonebook information for malicious communication.

16. Lastly, the Respondent also stated that the only third-party contacts they contact using the borrower's phonebook contacts are the emergency contacts nominated by the individual borrowers. That upon registration and application of a loan, the loanee nominates emergency contacts who are then notified through an SMS with an attached Call Centre number for them to accept or reject as being listed as emergency contacts and that the nominated emergency contact is not in any way related to the loan facilitation or repayment. That the emergency contact is only used for communication purposes in the event the loanee is unreachable.

ISSUE FOR DETERMINATION

i. Whether the Complainant's personal information data was lawfully processed.

D. ANALYSIS AND DETERMINATION

I. WHETHER THE COMPLAINANT'S PERSONAL INFORMATION/ DATA WAS LAWFULLY PROCESSED.

17. Before delving into this issue, this office would like to note that the Respondent never Responded to the allegations made by the 1st Complafinant and as such the allegations made by the first complainant remains uncontroverted.

18. Having established as such for the 1st Complainant's Complaint, this office will now turn to address the 2nd complainant's complaint.

19. As earlier stated the complaints relate to the processing of personal data wherein the Complainants allege that they have been receiving incessant messages from the Respondent demanding payment from them as guarantors of loans yet they have never guaranteed anyone loans with the Respondent whatsoever.

20. Section 2 of the Act defines processing as **"any operation or sets of operations which is performed on personal data or on sets of personal data whether or not by automated means such as:- (a) collection, recording, organization, structuring; (b) storage, adaptation or alteration; (c) retrieval, consultation or use; (d) disclosure by transmission, dissemination, or otherwise making available; or (e) alignment or combination, restriction, erasure or destruction."**

21. From this definition, it is evident that indeed the respondent were processing the personal data of the complainants. Having established that indeed all the while the Respondent was processing the complainant's personal data, This office now turns to the issue at hand on whether the Complainant's personal information/data was lawfully processed.

22. Section 30 of the Data Protection Act provides the lawful bases for processing personal data. It provides:-

30. Lawful processing of personal data

(1) A data controller or data processor shall not process personal data, unless –

(a) the <u>data subject consents to the processing</u> for one or more specified purposes; or

(b) the processing is necessary-

(i) for <u>the performance of a contract to which the data subject is a party</u> or in order to take steps at the request of the data subject before entering into a contract;

(ii) .....

23. The Respondent avers that it processed the 2nd Complainant's personal information with her consent. In as much as that might be the case it did not demonstrate as such. No evidence to the effect that both the complainant's consented to the processing of their personal data was produced and or adduced to this office.

24. Section 2 of the Data Protection Act defines consent as, "***<u>any manifestation of express, unequivocal, free, specific and informed indication</u> 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."***

25. Section 32 of the Act goes ahead to set the conditions of consent. As a condition it goes ahead to set out who bears the burden of proof with regards to consent.

26. The burden of proof for consent is set out under section 32(1) of the Act which states that:- "***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."

27. As such, the burden of proof for consent to the processing of data of the two complainants was borne by the Respondent.

28. From the evidence adduced to this office, there is no evidence that the Complainants consented to the processing of their personal data as alleged by the Respondent. That being the case, it, therefore, follows that the Respondent has not discharged the burden of proof of consent as required by the law. The allegations made by the complainants therefore remain unchallenged and they therefore stand.

29. Having established that there is no proof of consent to the processing of the personal data by the Respondent, it is therefore our finding that the Respondent processed the Complainants' personal data unlawfully.

E. FINAL DETERMINATION

30. In the ultimate the Data Commissioner, therefore, makes the following final determination;

    i. The Respondent is hereby found liable.
    ii. Enforcement Notice to issue.
    iii. Parties have the right to appeal this determination to the High Court of Kenya.

DATED at **NAIROBI** this 31st day of July **2023.**

Immaculate Kassait, MBS

DATA COMMISSIONER