



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0740 OF 2023

LIBURUWEN LESANGURU KWERI..... COMPLAINANT

-VERSUS-

BEEHIVE MEDIA 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 and the Judgment in Nairobi High Court Constitutional Petition No. E321 of 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

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providing data subjects with rights and remedies to protect their personal data from processing that is not in accordance with the Act.

4. The Office received a complaint dated 5th May, 2023 pursuant to the Judgement in *Liluruwen Lasanguru Kweri vs Beehive Media Limited and Capwell Industries Limited Nairobi High Court Constitutional Petition No. [REDACTED]* where the court ordered that the Petitioner ought to have lodged his complaint on Article 31 of the Constitution to this Office under the provisions of the Data Protection Act.
5. The complaint was thereby lodged in accordance with Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 ('the Regulations') from the Complainant who was an aggrieved data subject.
6. Pursuant to Regulation 11 of the Regulations, the Office, notified the Respondent of the complaints filed against them vide a letter dated 22nd May, 2023 referenced ODPC/CONF/1/5 VOL 1 (264) 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 is a resident of Samburu County and the Respondent, at all material times relevant to this Complaint offered digital marketing services for Capwell Industries Limited ('Capwell').
9. The Complainant was aggrieved by the publishing of his image without his authorisation on Capwell's Facebook page.

C. ANALYSIS OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

10. The Complainant, through his advocates filled Form DPC 1-Complaint Submission Form and stated that the Respondent published the Complainant's

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photograph without authorisation on Capwel's Facebook page with 168,576 followers in advertisement of Soko Maize Flour.

11. The Respondent then republished the Complainant's photograph without his authorisation on Capwel's Twitter handle with 4,212 followers and on their Instagram Page with 3,516 followers in further advertisement of the maize flour.

12. The Complainant stated that the publications remained accessible to the general public and were widely seen and reacted upon and that the Respondent used his image for commercial, for-profit purposes without his knowledge, awareness or prior consent.

13. The Complainant averred that the use of his image was not only misleading but also unconscionable and in violation of his rights to publicity.

14. The Complainant stated the particulars of violation of privacy as follows;

- i. Publishing and leaving the advertisement containing his photograph for 9 days;
- ii. Failure to notify him of the intended use of his photograph for commercial purposes;
- iii. Failure to obtain his consent before the publication;
- iv. Giving members of the public the impression of his endorsement of the advertisement;
- v. Giving the public the false impression that he had been appropriately remunerated for the use of his photograph.

15. The Complainant also submitted particulars of defamation. However, this Office does not have jurisdiction to determine on defamation matters.

16. The Complainant stated that the Respondent caused him needless and unnecessary mental anguish, torture and stress.

17. The Complainant attached a supporting affidavit deponed by himself reiterating the facts of the complaint as stated in the complaints form. He attached several screenshots marked as exhibit "LLK-1" of several advertisements containing his

image. He also attached a screenshot of Whatsapp messages from persons insinuating that he was paid for the advertisements.

18. The Complainant averred that he did not receive any written apology despite demand.

He attached a copy of a demand letter sent to Capwell Industries Limited. However, the letter did not bear a receipt stamp indicating that Capwell received the letter. It is also noted that Capwell is not a Respondent in this complaint.

19. The Complainant attached a copy of the Judgement that informed the lodging of his complaint at this Office.

20. Copies of the Complainant's photographs showing his likeness and a copy of his Identity Card were also produced as evidence.

21. The Complainant sought the following remedies:

- i. A declaration that the Respondent's actions amounted to breach of his fundamental right to privacy under Article 31 of the Constitution;
- ii. An order for compensation by the Respondent;
- iii. Recommendation for prosecution;
- iv. Issuance of an enforcement notice to the Respondent in accordance with the Act and Regulations.

22. He sought compensation for Kshs. 5,000,000 or any other amount of compensation as will be determined by the Data Commissioner. He relied on the following authorities regarding compensation:

- i. ***M W K v another vs. Attorney General & 3 others*** (2017) eKLR where the court awarded a global sum of Kshs. 4,000,000 for breach of privacy;
- ii. ***Ann Njoki Kumena vs. KTDA Agency Ltd*** (2019) eKLR where the court, having considered the purpose to which the photograph was used awarded the plaintiff Kshs. 1,500,000.

- iii. ***Mutuku Ndambuki Matingi vs. Rafiki Microfinance Bank Limited*** (2021) eKLR the court granted the sum of Kshs. 2,000,000 as damages for violation of the Petitioner's right to dignity and privacy.
- iv. ***David Gicheru v Gicheha Farms Limited & another*** (2020) eKLR where the court awarded the petitioner Kshs. 1,500,000 as compensation.

II. THE RESPONDENT'S EVIDENCE

23. The Respondent, through its advocates, provided a response to the allegations against them vide a letter dated 12th June, 2023 and stated that;
24. It is an ad agency that provides creative design, advertising and communications services to its portfolio of clients.
25. In 2021, the Respondent was onboarded by Capwell Industries for provision of the above services which were to be rendered in respect of their maize flour products commonly known as "Soko" and "Amaize".
26. In executing its mandate, the Respondent procured a licence from a public and royalty-free image repository by the name of Shutterstock Inc ('Shutterstock') and the image was acquired for fair value and in good faith. Shutterstock is an American company which owns a website which is a marketplace for high-quality royalty-free photographs, videos, among others.
27. The licence they acquired permitted them to utilize the Complainant's image for editorial purposes and that Shutterstock operates on the base of a royalty-free licence agreement therefore the fee paid for an image is the only fee payable for it. Therefore, the licensee will not be required to pay royalties for the use of the images.

The images on Shutterstock's website have a watermark with their logo hence cannot be illegally downloaded and used without a licence and one can only download files from their website after paying licence fees.

28. The images on Shutterstock are uploaded by contributors who operate accounts on its website. The Complainant's image was acquired from a contributor known as 'Papa Bravo' (the contributor) who describes himself as a photographer and biologist on his profile.
29. The Complainant's image was utilised in what it reasonably believed to be for educative and social purposes. The image was used in a post on Father's Day to show benevolence to fathers.
30. It legitimately acquired a licence over intellectual property; the Complainant's image from Shutterstock for purposes of utilising the same on Capwell's social media platforms and to celebrate Father's Day. The Respondent claimed that it lawfully acquired the picture of an African man of Kenyan descent to represent a father in its campaign to celebrate Father's Day. The image was not used for commercial or profit purposes by the Respondent.
31. The Respondent stated that it held an honest belief that using the Complainant's image was editorial use of the image which was consistent with the terms of the licence under which the same was acquired.
32. The Respondent denied taking the Complainant's image as it was sourced from a paid-for and public repository where it remains to this date. The image can be seen, re-shared and downloaded by third parties from Shutterstock's website without the Complainant's consent or authority as long as the third parties obtain the requisite licence from Shutterstock.
33. The image was licenced from Shutterstock and as per the licence, no authority or consent was to be obtained from the Complainant prior to the use of his image.
34. The Respondent made submissions regarding defamation. However, as stated above, this Office only confines itself to privacy issues.
35. The Respondent averred that the Complainant is not entitled to the remedies sought. However, they stated that should this Office find them liable, it was their submission that an award for compensation be guided by the following:
- i. The public profile of the claimant;

- ii. The permanence of the publication medium;
- iii. The length of the violation; and
- iv. Proof of damages suffered if any.

36. They relied on the following cases:

- i. ***Alternative Media Limited vs Safaricom Limited*** (2005) eKLR where the court awarded the claimant Kshs. 100,000 for copyright infringement noting that the claimant had failed to provide a meaningful criterion for calculation of the damages awardable.
- ii. ***Wangechi Waweru M'wende vs Tecno Mobile Limited; Rodgers Ouma t/a Ojwck Photography (Third Party) (2020)*** eKLR where the court awarded the claimant Kshs. 500,000 for infringement of the plaintiff's right to privacy.
- iii. ***FAF (suing on her own behalf and as a next friend of SAS and NAMS) vs Norwegian Refugee Council*** (2019) eKLR where the court awarded Kshs. 70,000 for each of the claimants.
- iv. ***Mutuku Ndambuki Matingi vs rafiki Microfinance Bank Limited*** (2021) eKLR where the court, considering the violation was from 2017 to 2020, awarded the petitioner Kshs. 2,000,000 for violation of the petitioner's right to dignity and privacy.

37. The Respondent stated that in this instance, the image was purchased as a royalty-free image and the alleged violation was for a period of about 7 days. Additionally, the post was pulled down immediately upon receipt of demand and they held the mistaken belief that the image was used in accordance with the terms of licence on Shutterstock's website.

38. Therefore, the Respondent proffered an apology in writing and they propose nominal damages.

39. The Respondent provided the licence they obtained from Shutterstock together with proof of payment and correspondence between themselves and the Complainant in an attempt to amicably resolve the matter.

40. They stated that the posts were deleted immediately it was brought to their attention and an apology was tendered in person to the Complainant during out of court negotiations that did not succeed.
41. The Respondent had no cause to suspect that legitimately procuring the Complainant's image for use would violate his privacy rights, given that the image was already on a mass-produced and royalty-free platform.
42. On the issue of the legal basis that the Respondent relied upon to process the Complainant's image, the Respondent stated that it collected the image from a public repository and had reasonable belief that the data was in a public record as a deliberate action on the part of the Complainant and that he had consented to his image being held in Shutterstock.
43. Further, the Respondent stated that it held a legitimate belief that the Complainant consented to his image being used in line with Shutterstock's licence and that the processing was necessary for compliance with its legal obligations under the contract with its client (Capwell).
44. The Respondent stated that it has a Data Protection Policy in place and shall ensure compliance by all staff. They provided the said Policy as proof of the same.
45. The Respondent was directed in the Notification Letter to demonstrate how it balances the rights and freedoms of the data subjects vis a vis internal policies and procedures. It responded that they have put in place a Data Protection Policy which will be available to data subjects on their website and shall provide the policy to data subjects when they interact with them.
46. Further, it stated that it shall obtain specific and express consent from data subjects before collecting, using, or sharing their personal information; and shall extend to data subjects the right to access, correct, delete or restrict the use of their personal information.
47. The Respondent stated that it shall take steps to protect the privacy and security of personal information by implementing appropriate technical and

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organizational measures to protect personal information from unauthorised access, use, disclosure, alteration or destruction.

48. They indicated that they designated an email address where data subjects may send complaints about the handling of personal information and have also appointed a data protection officer.
49. The Respondent stated that it endeavours to conduct regular privacy audits in order to identify and address any gaps in its privacy program. Further, they stated that they shall train employees on privacy, their data protection policies and how to protect the privacy of personal information.
50. As a mitigation measure, the Respondent stated that it has not renewed its licence from Shutterstock since the Complainant asserted that his image was on the website without his express consent.
51. The Respondent also wanted this Office to consider that upon the occurrence of the facts giving rise to the complaint, the agreement between themselves and Capwell was terminated. They provided a letter from Capwell dated 23rd September 2021 acknowledging receipt of a Termination Notice dated 13th September 2021 for an existing contract dated 4th January 2021.

D. INVESTIGATIONS UNDERTAKEN

52. The Respondent provided an invoice as proof of payment of the licence from Shutterstock. The invoice was billed to one [REDACTED] and it was for a 1-year upfront subscription for US\$979.00.

As part of its investigations, the Office wrote to the Respondents vide a letter dated 10th July, 2023 and referenced ODPC/CONF/1/7/2 Vol 1(328) requesting them to clarify on the capacity in which [REDACTED] was acting on behalf of the Respondent as shown in the invoice.

Vide a letter dated 24th July 2023 and referenced LAK/LIT/933/21/EKE the Respondents forwarded the Form CR12 of the Respondent confirming that [REDACTED] is one its Directors/Shareholders and therefore authorised to act on behalf of the Respondent.

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53. The Office also requested the contract between the Respondent and Capwell Industries and specifically the clause on data protection and privacy. Vide the same letter, the Respondents forwarded an unsigned contract dated 9th January, 2021. The contract did not contain any provision on data protection and privacy.

54. Additionally, the Office wrote a letter to Shutterstock Inc. asking them to provide details on the Complainant's image was still on their website and if the Complainant consented to the same. The letter went unanswered.

55. Further investigations into Shutterstock's website revealed that they have a Terms of Service (TOS). Part III of the TOS provides for WARRANTIES AND REPRESENTATIONS. Relevant to these investigations was section 3.1 (b) of the TOS which provides that:

"Video and Images in its original unaltered form and used in full compliance with this TOS and applicable law, ***will not violate any third parties' rights of privacy or publicity...***"

E. ISSUES FOR DETERMINATION

56. Having considered the nature of the complaint, the evidence adduced by all parties to the complaint and the investigations conducted by this Office, it is not in dispute that the Respondent used the Complainant's image in its advertisements on various social media platforms.

57. The Respondent did not deny that they did not seek express consent from the Complainant to use his images because they obtained the image from Shutterstock which they had a licence to use his image. They operated on the mistaken belief that Shutterstock or its contributors had obtained consent from the Complainant.

58. The issues for determination are therefore:

- i. Whether the Respondent infringed the Complainant's right to privacy; and
- ii. Whether the Complainant is entitled to the remedies sought for the alleged breach..

I. WHETHER THE RESPONDENT INFRINGED THE COMPLAINANT'S RIGHT TO PRIVACY

59. The right to privacy is enshrined in the Constitution under Article 31. The Act was enacted to effect Article 31 (c) and (d) which provides that every person has the right to privacy, which includes the right not to have;

c) Information relating to their family or private affairs unnecessarily required or revealed; or

d) The privacy of their communications infringed.

60. Further, the Act defines a data subject as an identified or identifiable natural person who is the subject of personal data. Personal data means any information relating to an identified or identifiable natural person. An identifiable natural person is 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.

61. A data subject under Section 26 of the Act has 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. The data subject in this case is the Complainant in this matter.

62. The Complainant has the right to be informed of the use of his image as clearly provided under Section 29 of the Act which states that a data controller or data processor shall, before collecting personal data, in so far as practicable inform the data subject of his rights specified under Section 26 and the purpose for which the personal data is being collected.

63. Further, in *Jessica Clarise Wanjiru vs. Davinci Aesthetics & Reconstruction Center & 2 others* (2017) eKLR, Mativo J. observed;

"...any intrusion of personal life by whatever means or form such as photography, written articles or caricatures may be ground for an action for breach of privacy."

In *T.O.S. vs. Maseno University & 3 Others* (2016) eKLR the court held that;

"...it is clear that publication or use of the images of an individual without his consent violates that person's right to privacy..."

64. Indeed, the Respondents have made their case that they acted on the mistaken belief that the Complainant knew that his image was on Shutterstock's website and therefore did not seek his consent before using the said image thereby infringing on his privacy. The Office has also considered the mitigation measures that the Respondent took to resolve the complaint being; pulling down the advertisements, terminating the contract they had with Capwell Industries and reaching out to the Complainant to try and resolve the matter out of court and out of this Office.

65. Consequently, as a data controller and data processor, the Respondent ought to have been alive to the principles of data protection, one being data protection by design and default, and ensure that they have express consent from data subjects whose images they use for advertisements.

The Respondent is therefore directed to put these measures in place to ensure that they obtain express consent from data subjects before using their image and uphold all other rights of data subjects as stipulated under the Act.

II. WHETHER THE COMPLAINANT IS ENTITLED TO THE REMEDIES SOUGHT FOR THE ALLEGED BREACH

66. The Complainant sought a declaration that the Respondent's actions amounted to breach of his right to privacy under Article 31 of the Constitution. This Office does not have jurisdiction to make such a declaration on the basis that this is a preserve of the Courts on interpretation of the Constitution.

67. The Complainant also prayed for compensation to be determined by the Data Commissioner.

In ***MWK & Another vs. Attorney General & 3 Others*** (2017) eKLR the court held that:

"It is self-evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof of or measurement in monetary terms."

68. Additionally, in ***Jessica Clarise Wanjiru vs. Davinci Aesthetics & Reconstruction Center & 2 others*** (2017) eKLR, the court considered the swiftness with which the bill boards in question were removed and found that the Petitioner did not demonstrate that she suffered any loss.

69. Similarly, the Complainant did not clearly demonstrate any financial loss caused by the Respondent to justify compensation. Further, the Respondents evidence that they obtained licence from Shutterstock where they got the image from is sufficient proof that there was lawful publication of the Complainant's image.

From the foregoing, the prayer for compensation against the Respondent is denied.

The Complainant is however advised to raise the matter with Shutterstock or the contributor who uploaded his photo on their platform.

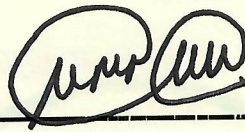
70. The Complainant also sought for recommendation for prosecution and issuance of an Enforcement Notice to the Respondent. These remedies are not applicable in this complaint as the Respondent is not liable for any criminal offence under the Act and is not liable for breach of the provisions of the Act.

F. FINAL DETERMINATION

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

- i. The complaint against the Respondent has been sufficiently addressed and is hereby resolved and closed.
- ii. Parties have the right to appeal this determination.

DATED at NAIROBI this 1st day of August 2023.



Immaculate Kassait, MBS

DATA COMMISSIONER