



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 0841 OF 2023**

**CHRISTINE WAIRIMU MUTURI..... COMPLAINANT**

**--VERSUS--**

**ROMA SCHOOL UTHIRU.....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) 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.
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. The Office received a complaint dated 22<sup>nd</sup> May, 2023 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.
5. Pursuant to Regulation 11 of the Regulations, the Office, notified the Respondent of the complaints filed against them vide a letter dated 9<sup>th</sup> June, 2023 referenced ODPC/CONF/1/5 VOL 1 (288) 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.
6. 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**

7. The Complainant alleged that the Respondent sought to process images of minors on their social media platforms, particularly Tik Tok, without the express consent of their parents or guardians.
8. The category of personal data that was intended to be processed by the Respondent relating to the minors was for marketing purposes.
9. Being a parent at the Respondent School, the Complainant stated that she requested for measures that the Respondent would take to ensure processing of the minors' personal data would be done in accordance with the law and such measures were not provided hence the lodging of this complaint.

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

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

10. The Complainant filled the Complaint Submission Form and stated that the Respondent intended to process a minor's personal data by an unregistered data controller for the purposes of marketing.

11. She sought the following reliefs:

- i. Copies of the School's certificate of authorisation from this Office;

- ii. Copies of the School's data protection policy; and
- iii. An acknowledgement that the school had read and understood TikTok's privacy policy.

12. Upon notification of the complaint to the Respondent, they replied via an email dated 6<sup>th</sup> July, 2023 denying the allegations and requested that the Complainant provide more details on the allegations made, particularly; her full name, contacts, name of her child, her class and the data alleged shared on the TikTok platform.

13. The Office then informed the Complainant of the above request via an email dated 10<sup>th</sup> July 2023. She responded to the said email on the same day and averred that she is a parent at the Respondent School and has been paying school fees for her daughter, a minor whom she did not wish to name. Further, the Complainant provided a receipt confirming payment of school fees at the Respondent School as evidence that she is a parent at the school.

14. The Complainant stated that the Respondent, through a Whatsapp group created for parents and teachers of the school, informed parents that it would be creating TikTok videos on its page and notified parents of their intention to include children in class on its TikTok profile to showcase the students' talents as well as market the group. She attached screenshots of the said Whatsapp group messages as part of her evidence.

15. Together with other parents, the complainant was concerned about the intended exposure of children to social media and inquired the justification of the same to which the Respondent gave no response. Further, they requested details of the Respondent's data protection policy which was not provided.

16. It was upon this premise that the Complainant lodged a complaint with this Office for resolution on the ground that the Respondent did not provide the parents with an opportunity to give their informed consent on the proposed posting of videos of minors on a social media platform to market the school's teaching methods.

17. Owing to the sensitive nature of personal data relating to minors and the risks attendant to sharing information relating to children online, the Complainant

stated that she was apprehensive that any such processing in the absence of appropriate safeguards would threaten her child's safety and right to privacy.

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

18. Upon receipt of the notification of complaint from this Office, the Respondent responded to the complaint vide an email dated 6<sup>th</sup> July, 2023 and stated that they do not have a pupil or a parent by the Complainant's name in their school and they are not aware of any minor's data shared on TikTok or any of their social media platforms.
19. Further, the Respondent averred that they have never received any complaint from any parent regarding the same and therefore unable to address the allegations brought forth by the Complainant. In this regard, the Respondent requested the details of the Complainant as stated above to enable them do further investigations and address the allegations.
20. The Respondent averred that the school has various social media platforms and they neither share nor market the school using minors' data.
21. It is noteworthy that once the Complainant provided the information requested by the Respondent, which the Office sent to the Respondent vide an email dated 11<sup>th</sup> July 2023, requiring them to further respond to the allegations, they did not provide a further response to the allegations made. Therefore, the allegations made against the Respondent remain uncontroverted.
22. Regulation 11 (2) provides that where a Respondent does not take any action as contemplated under sub-regulation (1), the Data Commissioner shall proceed to determine the complaint in accordance with the Act and these Regulations. Therefore, I shall proceed to determine this complaint as per the above Regulation.

## **D. INVESTIGATIONS UNDERTAKEN**

23. Investigations conducted by this Office revealed that indeed the Respondent operates a TikTok page and posts images and videos of the pupils who are minors.

24. Further, they operate a Facebook page which depicts marketing of the school using the minors' images in form of photographs and videos.

#### **E. ISSUES FOR DETERMINATION**

25. Having considered the nature of the complaint, the responses of the parties to the complaint and the investigations conducted by this Office,

26. The issues for determination are therefore:

- i. Whether the Respondent processed personal data relating to children in accordance with the Act; and
- ii. Whether the Respondent is in breach of the Act.

#### **I. WHETHER THE RESPONDENT PROCESSED PERSONAL DATA RELATING TO A CHILD IN ACCORDANCE WITH THE ACT**

27. Article 53 (2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child.

28. The Act, under Section 33, provides for processing of personal data relating to a child and states that;

*(1) Every data controller or data processor **shall not** process personal data relating to a child unless-*

*(a) **Consent** is given by the child's parent or guardian; and*

*(b) The processing is in such a manner that **protects and advances the rights and best interests of the child.***

*(2) A data controller or data processor **shall** incorporate appropriate mechanisms for age verification and consent in order to process personal data of a child.*

*(3) Mechanisms contemplated under sub-section (2) shall be determined on the basis of-*

*(a) Available technology;*

*(b) Volume of personal data processed;*

*(c) Proportion of such personal data likely to be that of a child;*

*(d) Possibility of harm to a child arising out of processing of personal data; and*

*(e) Such other factors as may be specified by the Data Commissioner.*

29. The consent contemplated under Section 33 of the Act is mandatory from the wording of the Act. Further, Section 32 (1) of the Act provides 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. Again, this is a mandatory requirement.

*iv. Collected **only where a valid explanation** is provided whenever information relating to family or private affairs is required.*

41. The rights of a data subject are provided under Section 26 of the Act. In relation to a minor, Section 27 (a) of the Act states that a right conferred on a data subject may be exercised where the data subject is a minor, by a person who has parental authority or by a guardian. The Complainant in this case exercised the right of her child, a minor, as stipulated under Section 27 of the Act. She exercised her child's rights as a data subject to object to the processing of all or part of the child's personal data.

42. The Respondent is seen to attempt to subvert this right from their response, in the Whatsapp group messages, with regards to the parents of the children objecting to the posting of their images and videos on the Respondent's social media pages.

43. By failing to provide a valid explanation as to the reasons for posting the children's data on their social media platforms, the Respondent is in breach of the aforementioned provisions of the Act.

44. Additionally, Section 34 (1) (d) of the Act provides for restrictions on processing and states that a data controller or data processor **shall**, at the request of a data subject, restrict the processing of personal data where the data subject has objected to the processing, pending verification as to whether the legitimate interests of the data controller or data processor overrides those of the data subject.

45. The Complainant, together with other parents exercised this right by restricting the Respondent to process their children's images by posting them on their social media platforms. Investigations conducted by this Office have established

I will issue an Enforcement Notice on the Respondent as per Regulation 16 of the Regulations requiring it to take steps within a stipulated period as will be specified in the notice.

#### **F. FINAL DETERMINATION**

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

- i. The Respondent is hereby found liable on multiple violations of sections 9, 25, 26, 29, 32, 33 and 34 of the Act.
- ii. An Enforcement Notice be issued to the Respondent for breach of the provisions of the Act and for failure to cooperate with this Office.
- iii. Parties have the right to appeal this Determination.

DATED at **NAIROBI** this 11<sup>th</sup> day of August 2023.



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

