



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0988 OF 2023 & 0974 OF 2023 AS CONSOLIDATED WITH ODPC COMPLAINT NO.1006 OF 2023

ANNSALONE WANGARI.....1ST COMPLAINANT

JAYTIE SICHIRI.....2ND COMPLAINANT

-VERSUS-

ZEROX TECHNOLOGY COMPANY LIMITED.....RESPONDENT

DETERMINATION

(Pursuant to Sections 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 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 (f) of the Act 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 "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. The Office received complaints by the 1st and 2nd Complainants on 13th June 2023 and 14th June 2023 respectively pursuant to Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter as "the Regulations") has conducted investigations into the complaints.
4. The Respondent is a digital credit provider that runs AsapKash and the complainants are parties who received messages from the Respondent.
5. The Office, in exercise of its mandate as envisaged under the Act and in the promotion of justice, notified the Respondent of the complaints filed against it vide a letter dated 22nd June, 2023 and received by the Respondent on 22nd June, 2023. In the notification of the complaint filed against the Respondent, the Respondent was to provide: -
 - (a) A response to the allegation made against them by the complainants;
 - (b) Any relevant materials or evidence in support of the response;
 - (c) The standard contract between themselves and the complainants;
 - (d) The legal basis relied upon to process and engage with the complainants, or how they fulfill the duty to notify under Section 29 of the Data Protection Act, 2019;
 - (e) Demonstration of how the Respondent balances the rights and freedoms of the data subjects *vis-à-vis* their internal policies and procedures;
 - (f) Details of all the product names/mobile money lending apps ran by the Respondent;
 - (g) Proof of registration with this office as data controllers and data processors
 - (h) Details (in writing) of:
 - (i) The mitigation measures adopted or being adopted to address matters arising from the complaints;
 - (ii) The technological and organizational safeguards that have been put in place to ensure that such occurrences mentioned in the complaints do not take place again; and

- (iii) Their 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 alleged contravention directed to their attention by data subjects.
- (i) Demonstration (by way of a written statement) of their level of compliance with the requirements under the Act and the Regulations. In particular, an elaborate representation of how a data subject can exercise their rights in relation to data protection.
6. The Respondents gave their response vide a letter dated 26th June 2023. The same was received by the office on 6th July 2023.
7. Upon receipt of the Respondent's response letter, investigations were conducted as required by Regulation 13 (1) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021.
8. This determination is premised on the provisions of Regulation 14 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 COMPLAINTS

9. The 1st Complainant alleged that representatives of AsapKash, a product of the Respondent, were calling her and demanding that she repay their loan. She stated that she never took a loan from the Respondent and that the Respondent informed her that it would hold her accountable for a third party's loan.
10. The 2nd Complainant alleged that she was receiving text messages from representatives of AsapKash, a product of the Respondent, telling her that a third party listed her as a guarantor. She further claimed that the Respondent proceeded to bombard her phone with calls and text messages jam-packed with insults. She attached screenshots as proof of the many calls she received from AsapKash.

C. THE RESPONDENT'S RESPONSE

11. The Respondent, *via* a letter dated 26th June 2023 received by the Office on 6th July 2023, responded to the Notification of Complaint.

12. The Respondent confirmed that the 1st Complainant was never their client. They stated that her contact details were provided by a third party who was one of their borrowers and who was required to provide alternative phone numbers in addition to their primary phone number when applying for a loan as per the Respondent's company contract.
13. They stated that the alternative phone numbers are referees which the company contract mandates that a borrower provides during registration and requisition of a loan. The Respondent averred that it is only able to contact the referees whose details have been voluntarily submitted by the borrower who is their client.
14. The Respondent confirmed that the 1st Complainant was contacted on the basis that she had been listed as the third party's emergency contact and in particular as the third party's spouse.
15. The Respondent further stated that they are truly sorry and apologize for the frequent call and text messages to the 1st Complainant. They further added that in their company rules and regulations, they recommend that an agent call a client at least 3 times a day, and that it also has an automated system that sends a reminder to a client to re-pay their loan via call or text.
16. With regards to the 2nd Complainant, the Respondent acknowledged that its agent contacted the 2nd Complainant and that the type of text message being used by its agent went against the company's rules and regulations and was done without the Respondent's consent.
17. The Respondent stated that as a company they have taken immediate action against that particular agent who contacted the 2nd Complainant upon receiving the letter of notification of breach from the office.
18. The Respondent stated that they are very sorry about the nature of messages received by the 2nd Complainant and that they will through its customer care services provide a written apology to her and the same will be copied to the Office.
19. The Office is yet to receive a copy of the written apology to the 2nd Complainant from the Respondents herein.

D. ISSUES FOR DETERMINATION

- i. Whether the Respondent fulfilled its duty to notify the Complainants of the use of their contact details as per section 29 of the Act.

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- ii. Whether there was any infringement of the Complainants' Rights as data subjects as provided for in the Data Protection Act, 2019.

I. WHETHER THE RESPONDENT FULFILLED ITS DUTY TO NOTIFY THE COMPLAINANTS OF THE USE OF THEIR CONTACT DETAILS AS PER SECTION 29 OF THE ACT

20. Section 29 of the Act provides for the duty of a data controller or data processor to, before collecting personal data, inform the data subject of their rights under Section 26 of the Act, the fact that their personal data is being collected and the purposes for which their personal data is being collected among others.
21. Further, Section 28 of the Act provides that a data controller or data processor shall collect personal data *directly* from the data subject.
22. The Respondent in its response admitted to having contacted the Complainants in a bid to have them inform the borrowers of their outstanding loans. It stated that it obtained the contacts **from its borrowers** who provided the information voluntarily.
23. The Respondent stated that its company has a system by which they use to send text messages to clients. It further stated that failure by an agent to use the system is the same as not respecting its company's rules and regulations and that if an agent fails to follow the company's rules and regulations its action shall be to terminate the contract between itself and the said agent.
24. The Respondent's position is duly noted. However, for the purpose of these complaints, the Respondent has failed to prove that the Complainants were duly informed that their numbers had been listed as emergency contacts and/or guarantors.
25. In this regard, I find that the Respondent did not obtain prior consent from the Complainants and did not notify them before enlisting them as emergency contacts and/or guarantors. In addition, the Respondent did not have a mechanism whereby the proposed emergency contact(s) and/or guarantor(s) can:
 - a) have the liberty to decide whether or not they can be used as an official contact of the borrower with regards to the repayment of the loan advanced by the borrower; and

- b) have the liberty to decide whether or not they will guarantee a borrower how much they are going to guarantee and whom they are guaranteeing. The Complainants did not have an option to decline to guarantee a borrower and were only informed about the loan when the borrower had defaulted or failed to pay in time.

26. I find the Respondents liable for breach of Sections 28 and 29 of the Act.

II. WHETHER THERE WAS ANY INFRINGEMENT OF THE COMPLAINANTS' RIGHTS AS DATA SUBJECTS AS PROVIDED FOR IN THE DATA PROTECTION ACT, 2019

27. Section 26 of the Data Protection Act provides for the rights of a data subject which are: -

- a) to be informed of the use to which their personal data is to be put;
- b) to access their personal data in custody of data controller or data processor;
- c) to object to the processing of all or part of their personal data
- d) to correction of false or misleading data; and
- e) to deletion of false or misleading data about them.

28. By not informing the Complainants of the collection of their personal data, the method of collection and the use to which their personal data was to be put, at the point of collection of the personal data, the Respondent, violated the Complainants' right to be informed.

29. The Respondent collected the contacts of the Complainants from its clients without:

- a) prior authority from the data subjects, in this case the Complainants, whose data was being collected.
- b) informing the Complainants that their personal data was being collected and the purpose that data was to be used for.

30. The Respondent failed to inform the Complainants that it was collecting their mobile phone numbers and that it was going to process that information for the purpose of debt recovery from defaulting third parties. The Respondent should have informed the Complainants, before collecting their phone numbers, (regardless of the mode of collection) that they were collecting the phone numbers in order to contact the complainants in the event that the third-party borrowers default in repaying their loans. The Respondent should have given the

Complainants the option to authorize or decline the use of their phone numbers for these purposes.

31. Further, as a data controller, the Respondent should only collect personal data directly from the data subject as per Section 28 of the Act unless the data subject has consented to the collection of their data from another source.

32. In view of the foregoing, I find that the Respondent violated the rights of the data subjects as provided for in the Act by failing to inform the Complainants of the collection and use of their personal data and that the Respondent did not collect personal data directly from the data subjects.

F. FINAL DETERMINATION

33. The Data Commissioner therefore makes the following final determination;

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

DATED at **NAIROBI** this 8th day of September **2023**



IMMACULATE KASSATT, MBS
DATA COMMISSIONER

