



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 725 OF 2023

EDITH ANDESO..... COMPLAINANT

-VERSUS-

OLERAI SCHOOLS 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)

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 as "the Act") was enacted.
2. Section 8 (1)(f) of the Act provides that the Office of the Data Protection Commissioner (hereinafter 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

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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. It is on that basis that the Office received a complaint on 3rd May, 2023 pursuant to Section 56 of the Act from the Complainant, who was an aggrieved data subject.
5. The Respondent is a Primary School covering Kindergarten to Junior Secondary Education while the Complainant is a former teacher at the school.
6. 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 via a letter dated 19th June 2023, which was served upon the Respondent on 20th June, 2023. In the notification of the complaints filed against the Respondent, the Respondent was to provide: -
 - (a) A response to the allegations made against it by the Complainants;
 - (b) Any relevant materials or evidence in support of its representations above;
 - (c) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant;
 - (d) The legal basis relied upon to store, process and engage with the Complainant's personal data and whether or how it fulfils the duty to notify under Section 29 of the Act;
 - (e) Details of it fulfils the data subject's right of rectification and erasure as per Section 40 of the Act;
 - (f) The technical and organizational safeguards that have been put in place to ensure that such occurrences mentioned in the complaints do occur again;
 - (g) It's data protection policy outlining the complaints handling mechanism to deal with matters relating to the rights of a data subject under the Act, the Regulations and any alleged contravention directed to its attention by data subjects;

- (h) Proof of registration with the Office as data controllers and data processors; and
 - (i) Demonstration (by way of written statement) of its 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.
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 Complainant alleged that the Respondent used her photograph to advertise the school without her consent or approval.
9. The Photo was posted on the Respondent's Facebook page on or around 13th January, 2023 with the caption "at Olerai Schools, we believe in fostering all-round development in our learners. Our teachers are dedicated to helping each learner reach their full potential, and we are confident that their guidance and support will have a lasting impact on our learners' development."

ANALYSIS OF EVIDENCE ADDUCED

I. EVIDENCE ADDUCED BY THE COMPLAINANT

10. The Complainant filled the complaint's form and stated verbatim that "Olerai Schools Limited has continued to use my photographs to commercially advertise the school without my consent or approval."
11. The Complainant attached the subject photos, an undated and unsigned statement and a demand letter to the Respondent dated 18th April, 2023. Further, the Complainant in her statement stated that she was employed by the Respondent on 6th January, 2016 as a full-time teacher.

12. That on or about October 2022, the Respondent procured the services of a photographer who took photos of students and teachers in classes. The photos were later posted on the Respondent's Facebook page on or about 13th January, 2023.
13. Further, the Complainant stated that she consulted the school management and was informed that the parents to the respective students consented to the photos being published but her consent was never sought at any point.
14. The Complainant further claims that she feared pursuing her rights to question the Respondent's actions as she was still an employee of the Respondent and that it was only after her dismissal from employment that she pursued the matter.
15. The Complainant stated that she wrote a demand letter to the Respondent demanding for the school to admit liability for infringing upon her rights and adequately compensate her but she did not hear from them, prompting her to file the complaint at the Office of the Data Protection Commissioner.
16. The Complainant asserts that the photo created a perception that she was a member of Olerai Schools Limited therefore limiting her opportunities of employment elsewhere. She also stated that the photos created a perception that she received monetary gain from her photo being used to commercially advertise the school.
17. Further, the Complainant stated that the Respondent pulled down the photo but did not invite her for any negotiations for compensation.
18. Finally, the Complainant prayed for compensation for the unauthorized/illegal usage of her image for commercial purposes.

II. EVIDENCE ADDUCED BY THE RESPONDENT

19. The Respondent through its advocate and via a letter dated 3rd July, 2023 responded to our notification of complaint letter. In the said letter, the Respondent stated that it had employed the Complainant as a teacher for a period of seven years and that her services were lawfully terminated on 24th March, 2023. The Respondent attached copies of the Complainant's employment contract, disciplinary proceedings and dismissal letter.
20. The Respondent admitted to having uploaded the Complainant's photo on its Facebook page and stated that it took down the photos complained of from its Facebook page after receiving a demand letter dated 18th April, 2023 from the Complainant's Advocate.
21. The Respondent averred that it had obtained the Complainant's consent prior to the use of her image. It stated that the Complainant had verbally consented to the photo being taken and that before the posting of the photo, the Complainant was required to confirm whether the parents of the concerned children had consented to the use of the children's images. The Respondent further stated that the Complainant indeed confirmed to the head teacher that the parents had consented and a list of the parents' consent provided. The Respondent attached a screenshot of the WhatsApp conversation between the Complainant and the headteacher as proof.
22. Further, the Respondent stated that at the time the photographs were taken and posted, the Complainant was not only a teacher but also a parent and had two of her children enrolled at the school and was fully aware that the school would not use the photos without her or that of the parent's consent. Additionally, the Complainant and her husband executed the Parent's consent forms dated 22nd November, 2022 on behalf of their children. The Respondent attached the consent forms as proof.
23. The Respondent also stated that the Complainant while coordinating the taking of the photographs and confirming that consent of the parents was obtained, did not

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indicate that she was not approving of the use of her image for the reason it was taken.

24. In addition to the above, the Respondent averred that through the Complainant's affirmative action of freely participating in the taking of the photo, confirming that the children's parents' consent had been obtained, giving consent on behalf of her children and failing to object to the use of the said image for a period of more than three months, was a clear manifestation of her consent.
25. The Respondent stated that its head teacher shared with the Complainant the subject picture containing her image but she did not decline or object to the processing of the same. It further stated that the Complainant is estopped from denying having knowledge or consent to use of the photo by virtue of her conduct and that the complaint made herein is meant to settle personal scores unknown to the Respondent, after the termination of the Complainant's employment.
26. The Respondent indicated that it understood the complaint made to it as a withdrawal of consent and pulled down the subject photos.
27. The Respondent also stated that no perception was being created that the Complainant was still in employment with it and therefore denying her employment opportunities elsewhere as the photos were taken down immediately upon receipt of the complaint demand letter.
28. Additionally, the Respondent stated that since the Complainant was its employee at the time the photo was taken and she was well aware why the photos were being taken, no perception could be created that she received monetary gain for her picture being used by the Respondent.
29. On the issue of the duty to notify imposed by Section 29 of the Act, the Respondent stated that it has put in place a mechanism of ensuring that an express consent is given by the employee before their personal data is collected and that all employees are required to sign a consent letter/form before their data is collected.

Additionally, the employees are informed of their right to refuse to consent and to withdraw the same at any time.

30. The Respondent stated that upon receiving a request to rectify personal data, it deletes the data as per the requests.

31. The Respondent also indicated that it is not registered as a data controller and data processor but it is in the process of effecting registration.

32. The Respondent stated that it has an unwritten policy in respect to collection, processing and storage of personal data as well as complaint handling procedure.

33. Finally, the Respondent prayed that the complaint against it be dismissed for having no merit.

C. ISSUES FOR DETERMINATION

34. Having considered the nature of the complaint and the evidence adduced by the parties to the complaint, it is not in dispute that the Respondent posted the Complainant's photo on its Facebook page.

35. It is also not in dispute that the Respondent pulled down the photo after a demand letter was sent to it.

36. The issues for determination are therefore;

- i. Whether prior consent was obtained by the Respondent before posting the Complainant's photo
- ii. Whether the Complainant is entitled to the remedy sought for the alleged breach.

I. WHETHER PRIOR CONSENT WAS OBTAINED BY THE RESPONDENT BEFORE POSTING OF THE COMPLAINANT'S PHOTO

37. Section 2 of the Act defines **consent** as *any manifestation of express, unequivocal, free, specific and informed indication 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.

38. Section 32(1) of the Act states that the ***data controller or data processor shall bear the burden of proof for establishing the data subject's consent to the processing of their personal data for a specified purpose.***

39. The Complainant alleges that her consent was never sought at any point before the posting of her photo on the Respondent's Facebook page. Moreover, the Complainant further stated that she was afraid to pursue her rights as she was still an employee of the Respondent and it is only after her dismissal from employment that she pursued her rights.

40. Additionally, the Complainant alleges that the Respondent utilized her photo for commercial purposes, therefore positioning themselves for admission of more students and financial gain on their part without any gain on her part.

41. The Respondent on the other hand alleges that that the Complainant had verbally consented to the taking of the photo and was aware of the reason her photograph was being taken. The Respondent stated the following in support of its position;

- i. That before the posting of the photo, the Complainant was required to confirm whether the parents of the concerned children had consented to the use of the Childrens' images and that the Complainant confirmed to the headteacher that the parents had consented and a list of the parents' consent provided. A screenshot of the WhatsApp conversation between the headteacher and the Complainant was provided as proof of the same.
- ii. That at the time the photos were taken and posted, the Complainant was not only a teacher but also a parent as she had two of her children enrolled at the school and was fully aware that the school would not use the photos without her or that of the parent's consent. The Respondent adduced Parent's consent forms dated 22nd November, 2022 in which the Complainant and her husband executed on behalf of their children as evidence.

- iii. That the Complainant coordinated the taking of the photographs and confirmation that the Parent's consent was obtained and at no time did she indicate that she was not approving the use of her image for the reason it was taken. Further that the Complainant had full knowledge of the purpose the photo was used for but she never objected to the same.
- iv. That through the Complainant's affirmative action of freely participating in the taking of the photo, confirming that the Children's parents' consent had been obtained, giving consent on behalf of her children and failing to object to the use of the said image for a period of more than three months, was a clear manifestation of her consent.
- v. That in the WhatsApp conversation between the head teacher and the Complainant, the headteacher shared with the Complainant the subject picture containing her image but she did not decline or object to the processing of the same.
- vi. That the Respondent in a show of good faith, pulled down the subject photo after consent was withdrawn.

42. From the foregoing, it is clear that the Complainant had knowledge of the purpose and the context in which the photos were to be used and consented to their use. The Complainant had an opportunity to view the photo and object to its processing before it was posted but chose not to. The Complainant also participated in the taking of the photo, confirmed that the children's parents' consent had been obtained, gave consent on behalf of her children and failed to object to the use of the subject photo for a period of more than three months. The Complainant by her clear **affirmative action**, consented to the processing of her personal data.

43. This office therefore find that the Respondent has discharged its burden of proof for establishing that prior consent was obtained before posting of the Complainant's photo.

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

44. The Complainant prayed for compensation for the alleged breach. I note that the Respondent obtained prior consent from the Complainant before posting the photo on its Facebook page and that even when consent was withdrawn by the Complainant, the Respondent swiftly pulled down the photo from its Facebook page. In the case of Jessicar Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Center & 2 Others [2017] eKLR, the Court held that "From the material presented in this case, the evident lack of clarity as to whether or not there was consent and considering the swiftness with which the bill boards were removed I find that there is no material before me to demonstrate that the petitioner suffered any loss."

45. In view of the foregoing, the prayer for an order for compensation is hereby declined.

D. FINAL DETERMINATION

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

- i. The Complaint is hereby dismissed.
- ii. 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