

OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1421 OF 2023

BENJAMIN MUTHENGI..... COMPLAINANT

-VERSUS-

ABSA BANK KENYA PLC.....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 complaint concerns the Complainant's claim that he opened an account with the Respondent on or about February 2021 but was not receiving notifications on his mobile phone. When he contacted the Respondent, it was discovered that his notifications were allegedly being received by an unauthorized third party.

B. LEGAL BASIS

2. Article 31 (c) and (d) of the Constitution of Kenya 2010 provides for the right to privacy. Consequently, as an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter 'the Act') was enacted.
3. The Office of the Data Protection Commissioner (hereinafter 'this Office' or '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

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

4. Section 3 (f) of the Act provides that the Office of the Data Protection Commissioner (hereinafter '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.

C. BACKGROUND OF THE COMPLAINT

5. The Office received a complaint by Benjamin Muthengi (hereinafter 'the Complainant') on 4th August 2023 pursuant to Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter the 'Enforcement Regulations') from the Complainant who is the aggrieved data subject.
6. Absa Bank Kenya PLC (hereinafter the 'Respondent') is a financial institution regulated by the Central Bank of Kenya and the Complainant is its client.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 21st August, 2023 referenced ODPC/CONF/1/5 VOL 1 (382) and required their response within 14 days. 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 mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant
 - d. An indication as to when the alleged disclosure of financial data happened.

- e. The legal basis relied upon to process and engage with the complainants, whether or how they fulfil the duty to notify under Section 29 of the Data Protection Act, 2019;
 - f. Details of how they fulfil the Data Subject's right of rectification and erasure as per Section 40 of the Act
 - g. The technological and organisational safeguards that have been put in place to ensure that such occurrence mentioned in the Complaint does not take place again.
 - h. The Organization's data protection policy outlining the complaints handling mechanism to deal with matters relating to the rights of data subjects under the Act, the Enforcement Regulations and any alleged contravention directed to your attention by data subjects.
 - i. Demonstration (by way of written statement) of your level of compliance with the requirements under the Act and the Enforcement Regulations. In particular, an elaborate representation of how data subject can exercise their rights in relation to data protection.
8. The Respondent responded to the notification of complaint letter *vide* a letter dated 1st September, 2023.
 9. 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.

D. NATURE OF THE COMPLAINT

I. COMPLAINANT'S CASE

10. On or about February 2021, the Complainant states that he opened an account with the Respondent. From the date of commencement of the banking relation, each time he transacted through his registered mobile phone number 0712XXXXX0 he did not receive transaction notifications on his mobile phone.

11. This prompted the Complainant to visit the Respondent's River Road Branch in March 2021 to inquire into the reasons for not receiving transaction notifications. His complaint was received and registered as Reference Number 20XXXXX9.
12. Upon investigation, the Respondent discovered it had erroneously input the wrong number into their database. The Complainant states that he was requested to fill a Change Request Form to facilitate the update.
13. Complainant further avers that there was no change and he still did not receive the transaction notifications. Consequently, he promptly called the Respondent's call centre and followed up with an email requesting for rectification of his details.
14. *Vide* an email dated 20th March 2021, the Respondent informed the Complainant that his number had been duly updated. The Complainant affirms that shortly after the phone call, he started receiving the transaction notifications on his mobile phone.
15. On or about April 2021, the Respondent disbursed loan proceeds of a loan that the Complainant had applied for earlier in the year. However, the Complainant states that following the disbursement of the funds he abruptly stopped receiving any transaction notifications.
16. The Complainant observes that he visited the Respondent's Buruburu branch and completed a Change Request form. Once again, the Respondent updated his phone number, and he started receiving transaction notifications.
17. On or about February 2023, the Complainant applied for a second loan facility with the Respondent. Once again, when the second facility was processed, the Complainant avers that he stopped receiving transaction notifications.
18. On 7th April 2023, the Complainant received a phone call from an unknown individual through phone number (0721XXXXX0) informing him that they were receiving the Complainant's Bank-Mpesa transaction notifications. The third-

party individual forwarded the Complainant several messages for his review and confirmation.

19. The Complainant promptly looked through his messages and noticed that he was receiving inconsistent and irregular transaction notifications. He states that ideally, for a complete transaction, he was receiving (2) two or (3) three transaction notifications, but he has been receiving one notification or none at all. The Complainant also noted that these notifications were sent to the third-party's number instead. The Complainant further noted that the third-party's phone number 072XXXXX80 was very similar to his registered Safaricom Number, 071XXXXX80 with the difference being the third digit.
20. The Complainant avers that this situation has highly inconvenienced him as the Respondent charges its customers transaction fees. In addition, whenever the Complainant sends money to his family, friends or business partners directly from his account, he incurs additional charges.
21. The Complainant states that this incident has caused significant distress and concern and that he fears that his financial information may be misused by unauthorized individuals. He further states that Respondent's actions of not safeguarding his personal data have eroded his confidence in its ability to protect his privacy and confidentiality as its customer.

II. RESPONDENT'S RESPONSE

22. The Respondent, on 1st September, 2023 provided a response to the allegations against it.
23. Regarding the issue of the Complainant not receiving transaction alerts, the Respondent states that this was occasioned by an inadvertent error during onboarding where the Complainant's mobile number was incorrectly captured on its system. The Respondent further states that this error has since been corrected and that the Complainant is receiving his transaction alerts regularly. Also, the Respondent states that it has also reached out to the Complainant to confirm the same.

24. The Respondent avers that neither the Complainant's account number nor his card details were shared with any third party. The Respondent explains that numbers are masked and cannot be used to identify a customer.
25. The Respondent states that it has a process through which it allows its customers to correct the personal information it holds. The Respondent further affirms the Complainant's statement that the Complainant was provided a change request form in which proposed changes were documented for action.
26. The Respondent asserts that the Complainant's complaint on transaction charges was sufficiently addressed and that all the deducted costs were refunded to the Complainant.
27. The Respondent states that there was no harm that befell the customer since no fraud or other irregular account activity was noted in the Complainant's account.
28. The Respondent avers that it has reached out to the Complainant to confirm that the complaints raised are sufficiently addressed and to further confirm whether the Complainant is comfortable with the resolution.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

29. The Complainant, submitted his complaint *via* the Office's website on 4th August 2023. As part of his evidence, he attached:
- a. screenshots of his bank transaction notifications that he received *from* the Respondent,
 - b. the transaction notifications sent to the third party by the Respondent with details about the complainant's transactions.
 - c. emails where he sought for correction and a subsequent response from the Respondent on the resolution of the query.

II. THE RESPONDENT'S EVIDENCE

30. The Respondent provided a response to the allegations against them *vide* a letter dated 1st September 2023.
31. On the allegation that the Complainant's details were irregularly shared with a third party, the Respondent states that neither the Complainant's account number nor his card details were shared with any third party and proceeded to attach a sample of the format of a transaction message as it is received by its customers.
32. As to the mitigation measures adopted and/or being adopted to address the complaints to the satisfaction of the customers, the Respondent states that:
- a. It effects the requested changes by its customers and inserts the correct contact details,
 - b. a refund is actioned for all charges on transaction messages that do not terminate on mobile phones.
33. With respect to Data Subject Rights, the Respondent states that it has put in place processes to ensure the requirements of the Data Protection Act are met; they include:
- a) All data subjects access requests
 - b) Requests for data portability
 - c) Objection to profiling
 - d) Objection to Processing
 - e) Correct the accuracy of personal data; and
 - f) Requests for destruction and deletion of personal data

F. ISSUES FOR DETERMINATION

34. Having considered the nature of the complaint, the evidence adduced by all parties to the complaint and the investigations conducted by this Office, the issues for determination are therefore:
- i. Whether there was infringement of Complainant's personal data under the Act;
 - ii. Whether the complaint was sufficiently addressed by the Respondent; and

- iii. Whether the Complainant is entitled to the remedies sought for the alleged breach.

I. WHETHER THERE WAS INFRINGEMENT OF COMPLAINANT'S PERSONAL DATA UNDER THE ACT

35. Data subject's rights are outlined under Section 26 of the Act and they 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*

36. In accordance with the data protection principles under Section 25 of the Act, every data controller or data processor shall ensure that personal data is: -

- a. processed in accordance with the right to privacy of the data subject*
- b. processed lawfully, fairly and in a transparent manner in relation to any data subject*
- c. collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes*
- d. adequate, relevant, limited to what is necessary in relation to the purposes for which it is processed*
- e. collected only where a valid explanation is provided whenever information relating to family or private affairs is required*
- f. accurate and, where necessary, kept up to date, with every reasonable step being taken to ensure that any inaccurate personal data is erased or rectified without delay*
- g. kept in a form which identifies the data subjects for no longer than is necessary for the purposes which it was collected; and*
- h. not transferred outside Kenya, unless there is proof of adequate data protection safeguards or consent from the data subject*

37. According to Section 25 of the Act and with regard to the Complainant's complaint, as a Data Controller and Processor it is the Respondent's duty to ensure that the Complainant's phone number, is processed in accordance with the right to privacy, that it is kept up to date and in a form that clearly identifies

the Complainant and lastly that every reasonable step has been taken to ensure that any inaccurate personal data is erased or rectified without delay.

38. The Complainant's phone number was erroneously captured at the point of initial collection. The Complainant, at the point of discovery of the error exercised his right to object by applying to the Respondent notifying it of the error. The Respondent responded to the complaint by issuing the Complainant with a change of details form to the processing of part of his personal data until the Respondent addressed and corrected the issue.
39. The Respondent in their response state that the details contained in the transaction notifications cannot be used to identify a customer nor their account particulars. In the Claimant's statement he states that he was informed of the error by the third party who was receiving his transaction notifications. The third party was able to access the Claimant's number from the transaction notifications and use the same phone number to reach the Claimant.
40. According to Section 2 of the Act "**personal data**" means any information relating to an identified or identifiable natural person. In this matter, the Claimant's phone number is personal data and it was accessed by a third party and used to identify him as the recipient of the transaction notifications terminating in the third party's phone number.
41. The Respondent verified that an unintentional mistake during onboarding resulted in the complainant's mobile number being entered into the system erroneously, which led to the third party receiving transactional alerts. The complaint did not get transactional messages as a result, although this has since been rectified, and the Complainant confirmed as much.
42. The Office observes that, in reference to the evidence submitted by the Respondent, the Respondent fixed the error and got in touch with the Claimant to verify the rectification. The complainant attested to the same.

43. In view of the foregoing, the Office finds that the Respondent upheld the Complainant's right to the correction of the inaccurate data.

II. WHETHER THE COMPLAINT WAS SUFFICIENTLY ADDRESSED BY THE RESPONDENT

44. Section 3 of the Act gives the object and purpose of this Act as:

- a. to regulate the processing of personal data*
- b. to ensure that the processing of personal data of a data subject is guided by the principles set out in section 25*
- c. to protect the privacy of individuals*
- d. to establish the legal and institutional mechanism to protect personal data; and*
- e. to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with this Act*

45. Section 25 of the Act set out hereinbefore provides the principles of data protection.

46. The Respondent accords the legal basis relied upon to collect, store, process and engage with its customers' personal data and to fulfil the mandate of data protection according to the Act is sourced from and directed by the (KYC) requirements bestowed upon banks by the banking Act and CBK prudential Guidelines.

47. To demonstrate adherence with the Act, the Respondent explains that it obtains consent from its customers at the onboarding stage. The Respondent further explains that the same is specifically achieved with respect to section 29 of the Act where the Respondent;

- a. Informs customers that it's collecting their personal information as required by banking laws and regulations
- b. Informs the customers that the purpose of collecting the information for (KYC) is to provide the specific products and services which they have signed up for.

- c. The Respondent also informs its customers that their personal data shall only be shared with third parties who are required to enable the provision of products and services that these customers have signed up for.
- d. The Respondent also states that its customers data shall only be shared with third parties where there is a legal/regulatory requirement to share their information with a regulator.
48. The Respondent also avers that it has complied with Section 40 of the Act. This section provides that a data subject may request a data controller or data processor:
- a. *to rectify without undue delay personal data in its possession or under its control that is inaccurate, out-dated, incomplete or misleading; or*
 - b. *to erase or destroy without undue delay personal data that the data controller or data processor is no longer authorised to retain, irrelevant, excessive or obtained unlawfully.*
49. The Respondent supports the above position by stating that it has a process through which it allows its customers to correct information. The Respondent inevitably re-affirms the Complainant's statement that in a bid to correct the error, the Complainant had been given a Change Request Form twice to correct his contact details.
50. The Respondent further certainly, authenticates the Complainant's claim where the Complainant stated that his personal data was wrongly captured in the system and as consequence transaction messages were not terminating into his phone number; rather, they were received by a third party. An error that the Respondent rectified.
51. In addition, in its Response, the Respondent states that the Complainant's account number and card details were never shared with any third party and that the numbers are masked and cannot be used in identification. This is evident from the screenshots availed to this office. Consequently, this explanation suffices in addressing the issue of sharing of sensitive personal data; that is account details and card number with a third party.

52. In view of the foregoing, the Office finds that the Respondent rectified the inaccurate personal data in its possession belonging to the complainant in line with Section 40 of the Act.

III. WHETHER THE COMPLAINANT IS ENTITLED TO THE REMEDIES UNDER THE ACT

53. The complainant sought for an award of compensation owing to the alleged unauthorized disclosure of personal data.

54. This Office has considered the merits of the Complaint and the Response of the Respondent and the evidence adduced. From the initial receipt of the Complainant's complaint, steps undertaken to rectify and resolve the issue, and the Respondent's mitigation measures addressing violations under the Act.

55. The Complaint was resolved as between the Respondent and the Complainant and the Complainant confirmed the same.

56. Further, the Respondent refunded the monies lost due to the irregular transaction fees to the Complainant and the Complainant confirmed receipt of the refund.

57. The Office therefore finds that that the Complainant has not demonstrated *vide* evidence adduced that he incurred any financial or non-financial loss as a result of the Respondent's actions.

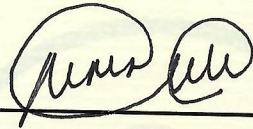
58. From the foregoing, the prayer for compensation against the Respondent is denied.

G. FINAL DETERMINATION

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 is dismissed.
- ii. Parties have the right to appeal this determination to the High Court of Kenya within 30 days.

DATED at **NAIROBI** this 2nd day of November 2023



Immaculate Kassait, MBS
DATA COMMISSIONER

