



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1514 OF 2023

ADEMA SANGALE.....COMPLAINANT

-VERSUS-

ZOSCALES PARTNERS.....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 Office received a complaint on behalf of the Complainant on 21st August 2023 against the Respondent with regards to the use of the Complainant's image in a video in the Respondent's website which was an alleged misrepresentation of the Complainant's role with the company.

B. LEGAL BASIS

2. 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.
3. The Office of the Data Protection Commissioner (hereinafter 'this Office' and/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 data subjects with rights and remedies to protect their personal data from processing that is not in accordance with the Act.

4. 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) 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.
5. This determination is pegged on the provisions of Regulation 14 of the Regulations which states that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

C. NATURE OF THE COMPLAINT

6. The Complainant alleged that she was previously consulting for the Respondent as an operating consultant. However, her work came to an end yet the Respondent continued to use a video of her to advertise their services and raise funds.
7. The Complainant sought that the Respondent pulls down the video as she was no longer an operating partner and clients should not see the video that she featured in and imitate that she was part of the organization.
8. The Complainant also sought punitive damages as their line of work is financial investing to ensure that they do not act habitually to use other people's personal details to raise funds.

D. SUMMARY OF EVIDENCE ADDUCED

i. The complainant's evidence

9. As part of this Office's investigations, the Complainant's representative was requested to provide a letter of authorization to act on behalf of the Complainant, proof of engagement of the Complainant with the Respondent and the alleged video containing the Complainant's image and evidence that it is the complainant in the said video.
10. In this regard, the Complainant's representative provided a letter dated 24th August 2023 from the Complainant authorising the representative to act on her behalf. The representative also provided correspondence between the Complainant and the Respondent, an Advisory Agreement (the agreement) between the Complainant and the Respondent as proof of engagement of the parties, and the link that alleged contained the Complainant's image that the Complainant requested to be taken down.
11. Upon provision of the said evidence, investigations conducted by this Office revealed that the agreement was signed in Addis Ababa on 21st October 2022. This raised a concern regarding the applicability of the Data Protection Act as it the processing of personal data by a data controller or data processor who is established or ordinarily resident in Kenya and processes personal data while in Kenya or not established or ordinarily resident in Kenya, but processing of personal data of data subjects located in Kenya. The Office therefore requested the Complainant to confirm her nationality and proof of the same.
12. This Office also noted that Article 14 of the contract provided vested all Intellectual Property of the Complainant to the Respondent. The Office therefore requested for a response to this provision and asked the Complainant to demonstrate violation of her privacy rights strictly under the provisions of the Data Protection Act and the Regulations thereof.
13. The Complainant responded via an email dated 15th September 2023 and indicated that she has instructed the firm of Adra Advocates to give a response

to our inquiries. The advocates responded *vide* an email on the same day confirming that the Complainant is a Kenyan citizen and attached her passport as proof of the same. They also indicated that they requested the Respondent to immediately remove from its website, social media accounts or promotional material any references to the Complainant via a demand letter sent to the Respondent. Additionally, they sent the Respondent a request for erasure via Form DPG 5 as provided for in Regulation 12 of the Data Protection (General) Regulations, 2021 (the General Regulations).

14. With regards to the question of specific violations of the Complainant's rights under the Data Protection Act, the advocates pointed out that in the video in question in which the Complainant appears, depicts her by name and as an operating partner of the Respondent between the time interval of 1 minute 30 seconds to 2 minutes and 16 seconds.

15. The advocates indicated that the agreement required the Respondent to cease using the Complainant's name and resume in any promotional material immediately upon termination of the agreement. Therefore, upon termination of the agreement on 29th May 2023, the promotional material ought to have been pulled down from the Respondent's website as of that date.

ii. The Respondent's evidence

16. Upon receipt of the Complainant's evidence, this Office notified the Respondent of the complaint *vide* a letter dated 19th September 2023 and required a response from them including the legal basis they relied upon to continue processing the Complainant's personal data despite termination of her contract and whether they upheld the Complainant's right of erasure.

17. The Respondent's response was two-fold. In the interest of justice and fair administration, this Office considered both responses provided by the Respondents.

18. The Respondent indicated that the complaint is lodged by a third party allegedly on behalf of the Complainant. They indicated that under Section 56 (1) of the Act, a complaint must be made by the data subject and not third parties, therefore the complaint is defective.
19. The Respondent stated that the sole allegation against them is that they used a video of the Complainant that misrepresented her role in the organization. They indicated that it was not stated in the complaint the nature of the video, where the video was allegedly used, in which media and the duration of time. Therefore, they submitted that this Office should compel the complainant to make this additional information available.
20. Further, they stated that the Complainant consented to the use of her name and resume in the Respondent's promotional material, without limitation and this use was to terminate immediately upon termination of the agreement by any party.
21. The Respondent confirmed having been using the Complainant's name, resume and likeness in all its promotional material without any complaint from the Complainant.
22. They stated that once the agreement was terminated, the Respondent stopped using the Complainant's name and resume and likeness in all its promotional material. Specifically, the Respondent removed the Complainant's CV from its homepage and there was no image or video of the Complainant in the Respondent's homepage.
23. Therefore, the Respondent stated that there was no breach as alleged by the Complainant as they did not continue processing her personal data from the date of termination of the agreement.
24. The Respondent stated that they complied with the obligation under Section 40 of the Act as read with Regulation 12 of the Data Protection (General) Regulations, 2021 in that they received a request to delete the Complainant's personal data and to rectify any information in their possession that expressed that she was still affiliated to them.

Upon receipt of the request, the Respondent stated that it erased and rectified the Complainant's personal data in line with her request, including her CV and likeness used on promotional material.

25. The Respondent put in a counter-complaint against the Complainant. However, the complaint was based on the organization's data which does not fall within the ambit of the Act and the attendant Regulations and therefore this Office shall not make a determination on it.

26. The Respondent also pointed out that there is an existing case which is pending hearing and determination before court with regards to termination of the agreement and therefore the complaint is without merit and should be dismissed.

27. The second response from the Respondent was with regards to their level of compliance with the Act, particularly, observing of data subjects' rights, data retention, and implementation of security measures and safeguards to protect personal data. They provided documentation to this effect which this Office has noted and can conduct an inspection and compliance audit after rendering this determination.

E. ISSUES FOR DETERMINATION

28. The following issues fall for determination by this Office:

- i. Whether the complaint was defective;
- ii. Whether there was a violation of Complainant's rights under the Act;
- iii. Whether the Respondent fulfilled its obligations under the Act; and
- iv. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE COMPLAINT WAS DEFECTIVE

29. The Respondent indicated that the complaint was defective as it was filed by a third party. Regulation 4 (3) (b) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 provides that a complaint may be lodged by a person acting on behalf of the complainant. This Office

requested for a letter of authorisation from the Complainant for the representative to lodge the complaint on her behalf. The authorisation letter was provided and therefore, the complaint was not defective and was legally lodged to this Office.

II. WHETHER THERE WAS A VIOLATION OF COMPLAINANT'S RIGHTS UNDER THE ACT

30. The Complainant is a data subject with rights under Section 26 the Act. Moreover, the Complainant has the right to correction and deletion of false or misleading data about them.

31. Further, Section 40 of the Act as read with Regulation 12 of the General Regulations provides that a data subject may request a data controller or processor to erase or destroy without undue delay personal data that the data controller or processor is no longer authorised to retain.

32. The Respondent in their response stated that they deleted the Complainant's details without undue delay. Further, investigations conducted by this Office demonstrated that the video was no longer uploaded on the link provided by the Complainant.

33. Therefore, the Respondent deleted the Complainant's personal data from their website thereby upholding the Complainant's right to erasure and deletion.

III. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

34. The Respondent is a data controller and a data processor within the definitions of the Act and therefore has obligations pursuant to the Act.

35. The Respondent has an obligation under Section 25 of the Act to adhere to the principles of data protection while processing the Complainant's personal data. From their response, the Respondent demonstrated that the Complainant's personal data was processed in accordance with the principles laid down under Section 25 of the Act.

36. The Respondent was able to demonstrate the legal basis they relied upon to process the Complainant's data which was the agreement entered into by both parties.

37. Further, as aforementioned, the Respondent deleted and erased the Complainant's personal data from their website as the video is no longer uploaded.

38. Therefore, the Respondent fulfilled its obligations under the Act with regards to this complaint.

IV. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS.

39. Having found that the Complainant's rights were upheld by the Respondent and that the Respondent fulfilled its obligations under the Act with regards to this complaint, the Complainant is not entitled to any remedies under the Act and the attendant Regulations.

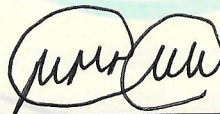
40. This complaint as against the Respondent hereby stands dismissed for lack of merit.

F. FINAL DETERMINATION

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

- i. The complaint is dismissed.
- ii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 16th day of November 2023.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER