



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1557 OF 2023

VICTOR AKIDIVA.....COMPLAINANT

-VERSUS-

THE CO-OPERATIVE BANK OF KENYA 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 Office received a complaint on 28th August 2023 against the Respondent with regards to his CRB report being allegedly disclosed to a third party without his consent or a court order.

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 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 Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (the Enforcement 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. BACKGROUND OF THE COMPLAINT

6. The Office received a complaint by Victor Akidiva (hereinafter 'the Complainant') on 28th August, 2023 pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainant, who is the aggrieved data subject.
7. The Complaint is against Co-operative Bank of Kenya Limited (hereinafter the 'Respondent'), a financial institution regulated by the Central Bank of Kenya to carry out banking services in Kenya. The Complainant is a client of the Respondent.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office notified the Respondent of the complaint filed against it *vide* a notification dated 20th September, 2023 referenced ODPC/CONF/1/5 VOL 1 (435) 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 complainant and a contact person who can provide further details as regards to the complaint;

- b. Any relevant materials or evidence in support of the response;
 - c. The legal basis relied upon to release the Complainant's personal data to third parties as per Section 30 of the Act;
 - d. Review the complaint with a view of summarily resolving the complaint to the satisfaction of the Complainant; and
 - e. Demonstration by way of any written statement of the 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.
9. The Respondent responded to the notification of complaint letter *vide* a letter dated 24th October, 2023.
10. 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. THE COMPLAINANT'S CASE

11. The Complainant alleged that his CRB report was shared by the Respondent to a third party – Pauline Kanini Muvya (hereinafter Pauline) who submitted the said report in an ongoing court case at the children's court as evidence against him. He stated that;
- a) Pauline was not a member of staff of the Respondent;
 - b) He was a customer of the Respondent and has an account there as well as a personal loan;
 - c) As part of Pauline's submission in an ongoing matter against him in a children's court, she adduced a CRB report that she allegedly obtained from the Respondent;
 - d) He reported the matter to the police;

- e) He raised the complaint with the Respondent and was yet to get any conclusive feedback as to the staff who leaked his CRB report to Pauline; and
- f) He reached out to TransUnion CRB who confirmed the report was generated by a user within the Respondent Bank.

12. The Complainant attached the CRB report dated 23rd April, 2021. He also attached an email dated 12th May 2021 as evidence of the communication between him and TransUnion CRB.

13. Upon request by the Respondent, the Complainant provided a Replying Affidavit sworn by Pauline dated 6th May 2021 in a matter in court. Paragraph 7(d) of the said affidavit indicated that she was producing the CRB report as evidence in the case against the Complainant.

II. THE RESPONDENT'S RESPONSE

14. Upon receipt of the Complainant's evidence, this Office notified the Respondent of the complaint *vide* a letter dated 20th September 2023 and required a response from them including the legal basis they relied upon to share the Complainant's personal data to a third party.

15. The Respondent then wrote a letter dated 9th October 2023 stating that the Complainant was a former staff of the Bank and, in the circumstances, they are investigating the complaint. The Respondent also sought information pertaining the complaint, including the affidavit admitting the CRB report as evidence in the children's court.

16. This Office forwarded the requested information and evidence to the Respondent *vide* a letter dated 16th October 2023 requiring it to respond to the complaint within seven days of receipt of the letter.

17. Through a letter dated 24th October 2023, the Respondent responded to the notification of complaint letter and stated that the CRB report was accessed by

a member of their staff who, in the course of their duty, had the rights to generate CRB reports.

18. The Respondent averred that the member of staff indicated that the report was generated in line with non-performing loans in her portfolio and stated that she did not issue the CRB report to non-account holders.
19. The Respondent claimed that it was unable to establish that the same was shared to a third party, Pauline. Therefore, the Respondent stated that it proceeded to lodge investigations with the Directorate of Criminal Investigations (DCI) to establish how Pauline obtained the CRB report.
20. The Respondent sought the indulgence of this Office in compelling Pauline to disclose how she obtained the report.
21. The Respondent claimed that it did not authorize sharing of the Complainant's information to a third party and that it has been regularly and diligently sensitizing its employees on the importance of data privacy and confidentiality through core briefs and a Data Protection Policy which they attached as proof of the same.
22. Further, through a letter dated 6th November 2023, the Respondent informed this Office that it had reported the matter with the Banking Fraud Investigation Unit through a letter dated 26th October 2023. The Respondent attached the letter as proof of the same.

E. INVESTIGATIONS CONDUCTED

23. Upon analysing the evidence adduced to this Office, summons dated 7th November 2023 were issued to Pauline to appear before the Office and provide an explanation of how she obtained the Complainant's CRB Report and the lawful basis that she relied upon to access the Complainant's personal data.
24. Pauline refused and/or neglected to honour the summons stating that she had a tight schedule and could only be available in January 2024.

25. It is therefore uncontested that Pauline produced the CRB report as evidence in a case against the Complainant in a Replying Affidavit dated 6th May 2021. She did not demonstrate to this Office the circumstances under which she obtained the same.

F. ISSUES FOR DETERMINATION

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

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

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

27. The Complainant is a data subject with rights under Section 26 the Act. Specifically, the Complainant has the right to be **informed** of the use to which his personal data was to be put.

28. While it is not in dispute that the Respondent collected the Complainant's personal data from him by virtue of the loan he had with them, sharing of this data with a third party without the consent of the Complainant was a violation of his privacy rights.

29. The Respondent indicated that it was unable to establish how Pauline got hold of the Complainant's CRB Report. This is indicative that the Respondent processed the Complainant's personal data in a manner that offends the Act and Regulations.

30. The Respondent therefore violated the Complainant's right to be informed of the use to which their personal data is to be put – specifically that the Respondent would share the Complainant's personal data with a third party without a lawful basis.

31. Further, Section 28 of the Act provides that a data controller or data processor shall collect personal data directly from the data subject unless they can prove that they fall within the exemptions under Section 28(2) of the Act.

32. Pauline collected information from the Respondent and not directly from the Complainant. This Office did not involve itself in the purpose of collection of the Complainant's personal data. What the Office considered was the mode of collection of the personal data by Pauline. It was clear that both the Respondent and Pauline did not collect and process the Complainant's personal data in accordance with the provisions of the Act.

33. Therefore, this Office finds that the Complainant's rights were violated by both the Respondent and Pauline.

II. 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. It provides thus –

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.

36. From their response, the Respondent stated that they were unable to establish who accessed the Complainant's CRB report and shared the same with Pauline. This response was not satisfactory to this Office because the Respondent, as a data controller, is obligated by Section 25 of the Act set out hereinabove to ensure that the Complainant's personal data is processed in accordance with the principles of data protection.

37. Moreover, Section 30 of the Act provides for the lawful processing of personal data. It states that a data controller or data processor shall not process data unless the data subject consents to the processing for one or more specified purposes or the process is necessary for the reasons set out in Section 30(1)(b) of the Act.

38. In the notification of complaint, the Respondent was asked to provide proof that it had a lawful basis to collect and process the Complainant's data. Whereas the Respondent stated that the CRB report was accessed by a member of their staff who, in the course of their duty, had the rights to generate CRB reports, the Respondent failed to establish the circumstances under which the CRB report generated by the Respondent's employee was shared with Pauline. Consequently, the Respondent failed to demonstrate that they had a lawful basis to further process the Complainant's personal data by sharing the same with a third party.

39. In addition, Section 32 of the Act provides for the conditions of consent and provides that a data controller and processor shall bear the burden of proof to

establish that the data subject consented to the processing of their personal data for a specified purpose.

40. The Respondent failed to discharge this burden by failing to establish how the Complainant's personal data was shared to a third party without his consent.

41. Further, Pauline was given an opportunity to explain herself to this Office on how she obtained the Complainant's CRB report. She failed to appear in accordance with the summons issued to her and hence also failed to discharge the burden of proof.

42. Section 41 of the Act provides for data protection by design or by default and mandates the data controller to implement appropriate technical and organisational measures designed to implement the data protection principles in an effective manner and to integrate necessary safeguards for that purpose into the processing. This duty applies both at the time of determining the means of processing the data and at the time of processing the data.

43. In their response, the Respondent alluded to not having established the manner in which the CRB report was shared to a third party without the consent of the Complainant. This position runs afoul Section 41 of the Act above.

44. Therefore, the Office finds that the Respondent did not fulfil its obligations under the Act with regards to this complaint.

45. The Office further finds that the manner in which Pauline obtained the Complainant's personal data was unlawful.

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

46. The Complainant sought various reliefs, including that the person who relied on his illegally obtained personal information to be prosecuted, fined and/or censured and that the Respondent be compelled to improve its processes in data protection.

47. Having found that the Complainant's rights were violated, an Enforcement Notice shall be issued against the Respondent pursuant to Section 58 of the Act.

48. Further, Pauline accessed the Complainant's personal data contrary to the provisions of the Act and failed to appear before this Office when summoned. As per Section 57 of the Act, A person who, without reasonable excuse, fails or refuses to comply with a notice, or who furnishes to the Data Commissioner any information which the person knows to be false or misleading, commits an offence.

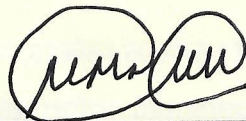
49. Therefore, Pauline is criminally liable for failing to appear before this Office.

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for violating the Complainant's personal data;
- ii. An Enforcement Notice be issued against the Respondent;
- iii. A recommendation is hereby made for the prosecution of Pauline Kanini Muvya under Section 57(3) of the Act; and
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 24th day of November 2023.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER