REPUBLIC OF KENYA

OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1585 OF 2023

JOHN MBURU..... COMPLAINANT

-VERSUS-

KENPLOY MANUFACTURERS LTD .....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. This Complaint is in respect of the Complainant's claim that he experienced an incident at the Respondent's dispatch section where, the Respondents agents/ authorized personnel requested his National ID and proceeded to take a photo of the ID and uploaded the same on their system without the complainant's consent. The complaint's request for the photo of his ID to be deleted was ignored hence infringing on the Complaint's rights as provided in Section 26 of the Data Protection Act, 2019.

B. LEGAL BASIS

2. Article 31 (c) and (d) of the Constitution of Kenya 2010 provides for the right to privacy. Consequently, 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 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 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

5. The Office received a complaint by John Mburu (hereinafter 'the Complainant') on 29th 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. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 2nd October, 2023 referenced ODPC/CONF/1/5 VOL 1 (428) and required their response within 14 days.

7. The Respondent responded to the notification of complaint letter *vide* a letter dated 24th October, 2023.

8. On 10th November 2023, this Office, in exercise of its investigative powers as envisaged under Sections 57(2), 59 and 60 of the Act conducted an investigation on the Respondent's ERP system and databases pertaining to the complaint.

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. The Complainant alleges that he experienced an incident at the Respondent's dispatch section where the Respondent's agents/ authorized personnel requested his National ID and proceeded to take a photo of the ID and uploaded the same on their system without the Complainant's consent. The Complainant further alleged that despite him requesting the Respondent to delete the photo of his ID from its system, the Respondent ignored and/or refused to act on his request thereby infringing on the Complainant's rights as provided in Section 26 of the Act.

II. RESPONDENT'S CASE

11. The Respondent, through their Advocates on record, provided a response to the allegations against them on 24th October 2023.

12. In the response, the Respondent's advocates stated that:

    (i) The Respondent received an email from the Complainant on 29th August, 2023 with the Complainant questioning why the company was uploading his ID Photos. The Respondent responded to his concerns the next day in an e-mail correspondence dated 30th August 2023 where the complainant was told as follows:

    "Dear Joseph, thank you for your e-mail detailing your experience. I apologize for the experience you had at the dispatch section. However, as explained in our phone call conversation this morning your scanned ID is recorded in our ERP as a standard procedure and is not used/uploaded anywhere else."

    (ii) The assurance made by the Respondent to the Complainant was made in a bid to allay his fears that the information obtained by the Respondent from him was a standard procedure and the Respondent had put in place a robust mechanism to protect the elements of confidentiality and integrity of his data and ensure that the data collected is ONLY for purposes of

dispatch and will not be accessible by anyone else. It is after this response and assurance that the Complainant further decided to lodge a further complaint with this office.

(iii) That the Respondent has employed risk mitigation measures at its factory's dispatch area. And, currently, the Respondent collects the information of the driver or the appointed customer representative who is collecting merchandise at its premises. The information collected at the dispatch area relates to the name of the person collecting the wares/ merchandise and their National Identity Number. The information is singularly intended to ensure that the Respondent is protected from incidences where customers may raise concerns that the purchased wares and merchandise have not been dispatched by the Respondent. The Respondent further averred that the request for this information from the customers is solely to mitigate incidences where customer representatives collect the wares and fail to deliver the intended goods to the end customer;

(v) That the Respondent employed the mitigating measures of collecting the names and identities of the customers after incidences where customers would present dishonoured cheques for the wares/merchandise sold. The customer details are input into the company ERP system to avert losses for the goods sold.

(vi) The Respondent has currently re-engineered its processes at the ERP level to refrain from collecting the personal information of the customers for the payments made by the customers.

(vii) The Respondent further stated that it has deleted all the personal information relating to the Complainant from its ERP system. The Respondent further adduced a screenshot of the invoice from the ERP system where they had captured the information about Joseph as proof

that the information is deleted from the page as well as from the database.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

13. The Complainant submitted his complaint *via* the Office's website on 19th August 2023. As part of his evidence, the complainant adduced:

    a. A copy of the purported National ID that a photo of the same was taken at the dispatch section,

    b. A copy of the conversation trail between the Complainant and the Respondent's management detailing the steps he had taken in exercising his right to deletion.

II. THE RESPONDENT'S EVIDENCE

14. As part of the Respondent's Response, the Respondent adduced the following evidence:

    a) A copy of the computer screenshot confirming that the Complainant's data has been deleted;
    b) A copy of certificate of registration as a data controller with this office;
    c) A copy of the Respondent's Information Security and Privacy Policy;
    d) A copy of the Respondent's Data Privacy Impact Assessment (DPIA) Policy; and
    e) A copy of the Consent Notice published by it.

F. ISSUES FOR DETERMINATION

15. 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 that arise are:-

    i. Whether the Complainant's personal information/ data was processed in accordance with the law; and

    ii. Whether the complaint was sufficiently addressed by the Respondent

G. ANALYSIS AND DETERMINATION

I. WHETHER THE COMPLAINANT'S PERSONAL INFORMATION/ DATA WAS PROCESSED IN ACCORDANCE WITH THE LAW.

16. As earlier stated this complaint relates to the processing of personal data wherein the Complainant alleges that his personal data was processed without his consent and that his request for deletion was not actioned by the Respondent.

17. Section 30 of the Act provides the lawful bases for the processing of personal data. It provides:-

30. Lawful processing of personal data

(1) A data controller or data processor shall not process personal data, unless –

(a) the data subject consents to the processing for one or more specified purposes; or

(b) the processing is necessary-

(i) for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject before entering into a contract;

(ii) For compliance with any legal obligation to which the controller is subject;

(iii) In order to protect the vital interests of the data subject or another natural person;

(iv) For the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(v) The performance of any task carried out by a public authority;

(vi) For the exercise, by any person in the public interest, of any other functions of a public nature;

(vii) For the legitimate interests pursued by the data controller or data processor by a third party to whom the data is disclosed, except if the processing is unwarranted in any particular case having regard

to the harm and prejudice to the rights and freedoms or legitimate interest of the data subject; or

(viii) For the purpose of historical, statistical, journalistic, literature, and art or scientific research.

(2) Further processing of personal data shall be in accordance with the purpose of collection.

(3) A data controller who contravenes the provisions of sub-section (1) commits an offence.

18. The Complaint at hand relates to consent as a lawful basis for the processing of personal data.

19. The Black's Law Dictionary, 10th Edition defines consent as "agreement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person."

20. Section 2 of the Act on the other hand 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.

21. The definition of the Act details the minimum criteria of or for consent to be that it must be certain that the individual has consented, and what they have consented to. This certainty requires more than just a confirmation that they have read and understood the terms and conditions also there must be a clear signal that they agree or have agreed to what is contained therein. The unambiguity of the consent also links in with the requirement that consent must be verifiable to the extent that one must be able to demonstrate that the data subject has consented to the processing operation.

22. From a collective reading of the above definitions, it is apparent that valid consent is a product of conscious decision-making and requires affirmative action. Therefore, in order to decide whether to process personal data or not, the controller must be aware of what the consent entails. Given that consent is given

by a data subject it must be obtained before any processing and it must comply with the Act and Regulations.

23. The Act goes further to state the conditions of consent. It states as follows with regard to the conditions of consent:-

32. Conditions of consent

(1) A data controller or data processor shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose.

(2) Unless otherwise provided under this Act, a data subject shall have the right to withdraw consent at any time.

(3) the withdrawal of consent under sub-section(2) shall not affect the lawfulness of processing based on prior consent before its withdrawal.

(4) In determining whether consent was freely given, account shall be taken of whether, among others, the performance of a contract, including the provision of a service, is conditional on the consent of the processing of personal data that is not necessary for the performance of that contract.

24. From the complaint adduced before this Office, the Complainant alleges that his personal data was obtained and processed without his consent. On this allegation, the Respondent did not rebut and/or produce evidence to the contrary. The Respondent did not dispense away with the burden of proof for the existence of a consent as envisaged under Section 32(1) of the Act above. The Respondent has not produced a signed and/or executed consent by the Complainant.

25. In view of the foregoing, the Office finds that the Complainant did not consent to the processing of his personal data.

II. WHETHER THE COMPLAINT WAS SUFFICIENTLY ADDRESSED BY THE RESPONDENT

26. Regulation 11(1) (b) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 provides an avenue for the Respondent to resolve and/or address a complaint upon notification of the same.

27. Whilst conducting its investigations, on 10th November 2023, this Office in exercise of its investigative powers as envisaged under Sections 57 and 60 of the Act conducted a site visit to the Respondent's premises. The aim of the site visit was to *inter alia* inspect the Respondent's ERP system with a view of establishing whether the Respondent had in deed deleted the Complainant's personal data as it had stated in its response.

28. From the aforesaid site visit it emerged that indeed the Respondent had collected the Complainant's personal data which was eventually deleted from its ERP system. As such, the complaint has been addressed.

29. The Respondent has therefore resolved the complaint.

H. FINAL DETERMINATION

30. In the ultimate the Data Commissioner makes the following determination:

    i. The complaint stands resolved.

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

DATED at **NAIROBI** this 26th day of November **2023**

Immaculate Kassait, MBS

DATA COMMISSIONER