



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1586 OF 2023

JOANNA BLOCK.....1ST COMPLAINANT

GABRIEL OSER.....2ND COMPLAINANT

(LEGAL GUARDIANS TO V.O MINOR)

-VERSUS-

KARIM ANJARWALLA.....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 relates to the Respondent's purported commentary on his **LinkedIn** social media platform of an extract of court documents that comprise of Complainants' minor's personal data.

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 '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 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) 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 Joanna Block and Gabriel Oser (hereinafter 'the Complainants') on 30th 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. Karim Anjarwalla (hereinafter the 'Respondent') is an Advocate of the High Court of Kenya and a senior partner at the firm of Anjarwalla & Khanna LLP.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a notification dated 11th September, 2023 referenced ODPC/CONF/1/5 VOL 1 (419) 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. Proof of consent to process data for minors under the Data Protection Act, 2019.
 - e. Demonstration by way of any written statement of the level of compliance with section 25, 26 and 27 of the Data Protection Act, 2019.

- f. Demonstration (by way of written statement) of the 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 replying affidavit dated 2nd October, 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 5th July 2021, the 1st Complainant avers that she was alerted by a friend of a post on LinkedIn social media platform by the Respondent giving a commentary of a case he was handling before court.
11. The 1st Complainant avers that the Respondent posted paragraph 5 of the Plaint as follows:
- "On or about 28th April 2021, Lxxxxx and the 2nd Defendant arranged for Dxx to have a playdate with the Defendant's son, Vxxxxxxxx Oxxx, at the Defendant's home at 1xx Mxxxxxx Rxxx, Hxxxx, Kxxxx within Nairobi County "(the premises)".**
12. That the offending paragraph failed to anonymize the 1st Complainant's minor's name and physical address. The 1st Complainant further asserts that her minor's name and physical address in the offending paragraph amounts to sensitive personal data hence exposing the minor to untold dangers.
13. The 1st Complainant further relied on Section 95(5)(a) of the Children's Act 2022 which has safeguards and protection of the identity of a minor stating that:

"In relation to any proceedings concerning a child, whether instituted under this Act or under any other written law, a person shall not publish or reveal

any publication or report, including any law report, any of the following matters: -

a) A child's name, identity, home or last place of residence or school."

14. Additionally, the 1st Complainant relied on Section 25 of the Data Protection Act, 2019 which sets out the principles of Data Protection and the alleged offending paragraph in the LinkedIn post was a violation of her son's right to privacy.
15. The Complainants aver that they did not consent to the publication of their son's personal data. They further pointed out Sections 27(a) and (c) of the Data Protection Act, 2019 on persons who can exercise their rights on behalf of a data subject and the Respondent did not belong to the said category.
16. The 1st Complainant observes that Section 33(3) of the Data Protection Act, 2019 protects a child by providing that before any data relating to a child is processed, one should also consider possibility of harm arising out of a child's personal data.
17. Lastly, the Complainants state that they are aware the Respondent allegedly pulled down the said LinkedIn post. However, they are cognisant to the damage that has already been done as the post was re-posted, with hashtags and/or any other social media users.

II. RESPONDENT'S RESPONSE

18. The Respondent *vide* a response dated 2nd October 2023 represents that he acted for one of the parties in High Court Civil Case No. E094 of 2023 against the Complainants.
19. The Respondent avers that on 4th July 2023 he published a post on his LinkedIn profile with a view to highlighting his client's plight and her quest for justice against the Complainants. Further, the Respondent avers that the focus of his post was not the complainants' son and hence did not disclose his personal data.
20. The Respondent states that he attached to his post a Complaint which is judicial record and was filed by A&K Advocates in the High Court against the

Complainants. The said Complaint contained the name of the Complainants' son and the location of the premises where the incident occurred.

21. The Respondent further opines that he is a long-standing Advocate of the High Court of Kenya and as such is familiar with the provisions of the Public Archives and Documentations Act which as read with the Evidence Act provide that the records of the High Court and any other court or tribunal are deemed to be public records. In this regard, he cited the decision of this Office in ODPC Complaint No. 677 of 2022 to lay emphasis on that basis.

22. Additionally, the Respondent cited Civil Procedure Rules, 2010 which provide under Order 4 Rule 1 that a Complaint should contain various particulars including name, description and place of residence of the Defendant and the place where the action arose.

23. The mention of the Complainants residential address according to the Respondent served two purposes. First was to comply with the provisions of Civil Procedure Rules which is a lawful basis under the Data Protection Act and the second was to effect service to the Complainants.

24. The Respondent avers that he understands the provisions of Section 72 of the Data Protection Act to mean that unlawful disclosure takes place when personal data is disclosed in a manner incompatible with the purpose for which the personal data was collected. The personal data in question was within the Respondent's client's knowledge in pursuit of a legal claim against the Complainants. Therefore the publication of the Complaint is a document of public record and the assertion of a legal claim amounts to a permitted general situation under Regulation 56(d) of the Data Protection (General) Regulations, 2021.

25. The Respondent contends that he understands the need to anonymize a minor's name for purposes of pleadings arises in matters concerning children under the Children's Act, 2022 and any amendments to the Complaint should be ordered by the High Court within the suit. The suit concerns his client and the violation of her fundamental rights and therefore the mention of the minors was incidental

to the suit to place a narrative before the court. Similarly, the minors are not the subject of the suit before the High Court.

26. The Respondent further brought to the attention of this Office the existence of an application dated 7th July 2023 where the Complainants filed an application before the High Court seeking that the Respondent be restrained from commenting on the suit before the High Court on the LinkedIn platform and any other media. The basis of the court application was an alleged violation of Data Protection Act, 2019. Consequently, the application before the High Court is still pending determination on the same.
27. The Respondent further avers that the 1st Complainant is guilty of material non-disclosure as she did not disclose to this Office that the complaint had previously been raised before the High Court of Kenya despite it being a requirement under the Complaints management manual.
28. The Respondent also observes that on the 10th July 2023, he became aware of the Complainants' application dated 7th July 2023 by way of his own initiative well before he was served with the application. Upon studying its contents, he immediately had the post in question deleted. Additionally, he opines that he was served with the said application on 19th July 2023.
29. Consequently, the Respondent avers that he had the LinkedIn post and the plaint pulled down in the interest of focussing on his client's claim and out of respect for the Complainants and their concerns thereto. Further, the Respondent claims that he has a constitutional right to free speech to publish the LinkedIn post and the fact that the plaint is a judicial record and a matter of public record.
30. Additionally, when both the Complainants and the Respondent appeared before court on the 19th July 2023, the Respondent's firm informed the court that the said LinkedIn post had been brought down thereby rendering the court application moot. He opines that the 1st Complainant did not agitate for the application to be heard and her counsel was satisfied with the fact that the LinkedIn post had been brought down.

31. The Respondent also observes that he procured the deletion of the post within hours of encountering the Court application which directly contradicts the 1st Complainant's assertion that she and the 2nd Complainant were not accorded a platform to object to the publication of the Plaint. He further avers that had the Complainants approached him to pull down his post he would have done so.
32. The Respondent asserts that the implication by the 1st Complainant that the deletion of the LinkedIn post was undermined by the fact that it had been re-posted is misleading since the deletion of a post on LinkedIn automatically results in a deletion of all re-posts by other users.
33. The Respondent contends that the Complainants' intent to continue with the application pending before the court and lodging of the complaint to this office poses a high risk and potential for embarrassment of administration of justice with the same subject matter being heard and determined by two separate organs.
34. The Respondent also states that the complaint fails to disclose or particularise to any degree of specificity any harm occasioned to the Complainants.
35. The Respondent avers that as an Advocate of the High Court, he understands that the determination as to whether the suit is a matter concerning children and as to whether the Complainants' minor son's details should be anonymized is for the High court to determine as it hears the court application.
36. In respect of the reliefs sought, the Respondent avers that:
- a) It would be counterintuitive for the Complainants to request for a public apology if the concern they have is the attention which has been drawn to the suit and the contents of the Plaint.
 - b) The need for an Enforcement notice has been overtaken by events given the deletion of the LinkedIn post within hours of being brought to his attention.
 - c) An order for compensation would not be warranted as the Complaint does not disclose or particularise harm that the Complainants' have suffered.

37. The Respondent's firm is committed to right of privacy and complying with Data Protection Act, 2019. The said firm was registered on 15th August 2022. Similarly, the firm has in place organizational and technical measures to safeguard the right to privacy.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

38. The Complainants, submitted their complaint on 30th August 2023. As part of their evidence, they attached:

- a) Affidavit in support of the complaint dated 30th August 2023.
- b) Screenshot of the commentary of the Respondent and copy of the Complaint on LinkedIn allegedly failing to anonymize the Complainants' minor's personal information (LinkedIn Post).
- c) Complaint dated 11th May 2023.

II. THE RESPONDENT'S EVIDENCE

39. The Respondent provided a response to the allegations against them *vide* a replying affidavit dated 2nd October 2023 in which he attached the following:

- a) ODPC Complaint no. 677 of 2022-Allen Waiyaki Gichuhi and another vs Florence Mathenge and Another
- b) Copies of correspondence between the Respondent's firm and another firm on 4th May 2023
- c) Court application dated 7th July 2023
- d) Copy of Supplementary Affidavit dated 27th September 2023.
- e) Copy of court directions issued on 10th July 2023
- f) Copy of email correspondence confirming deletion of post.
- g) Copy of email correspondence from the Complainants' counsel serving the court application to Respondent's firm
- h) Copy of Court proceedings before the High Court confirming that by 19th July 2023, the Respondent's firm had not been served with the court application.
- i) Copy of the Respondent's registration certificate with this office.
- j) Copy of the Respondent's firm's data protection policy and a screenshot of the website where said policy is available.

F. ISSUES FOR DETERMINATION

40. 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 this Office has jurisdiction to determine the complaint;
- ii. Whether there was infringement of minor's personal data under the Act;
- iii. Whether the complaint was sufficiently addressed by the Respondent; and
- iv. Whether the Complainant is entitled to the remedies sought for the alleged breach.

I. WHETHER THIS OFFICE HAS JURISDICTION TO DETERMINE THE COMPLAINT

41. The Respondent informed this Office of the existence of an application dated 7th July 2023 filed by the Complainants before the High Court. The said application seeks orders from the court that the Respondent takes down the LinkedIn post dated 5th July 2023, that the Respondent's firm be issued with a gag order to prevent them from discussing the said subject to the media at large, amongst other orders.

42. In the said application, the Complainants invoked Article 31 of the Constitution of Kenya, Section 25(a)(b)(e)(h) and 33 of the Act as some of the main grounds they relied on. The Respondent in this regard asserts that the application before the High court raises substantially similar grounds to those in the Complaint before this Office.

43. Having reviewed the said application, this Office finds that the orders sought in the said application can only be made to the High Court and therefore the Application is properly before the High Court. In particular, the Office has no mandate to issue a gag order to the Respondent from publishing, discussing and or reporting the subject matter of the proceedings to any media including television, newspaper, radio, internet and any other media at large.

44. Nonetheless, the complaint raises issues under the Act, including unlawful disclosure of a minor's personal data, which falls within the mandate of this Office to investigate any complaint by any person on the infringements under the Act as set out in Section 8(f) of the Act.

45. In that regard, this Office has the jurisdiction to determine the complaint on any infringement(s) under the Act.

II. WHETHER THERE WAS INFRINGEMENT OF MINOR'S PERSONAL DATA UNDER THE ACT

46. Section 27(a) of the Act provides that a right conferred on a data subject may be exercised where the data subject is a minor, by a person who has parental authority or by a guardian.

47. Section 33 of the Act provides for processing of personal data relating to a child. It provides that every data controller or data processor shall not process personal data relating to a child unless:

- a. Consent is given by the child's parent or guardian; and
- b. The processing is in such a manner that protects and advances the rights and best interests of the child.

48. Section 32 of the Act further provides for conditions of consent whereby the 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. Consequently, the burden is on the Respondent to prove that he had consent from the Complainants to share the pleadings with the minor's personal information.

49. The complaint at hand involves alleged posting on a social media platform of minor's personal information that was contained in the Complaint as follows:

"On or about 28th April 2021, Lxxxxx and the 2nd Defendant arranged for Dxx to have a playdate with the Defendant's son,

Vxxxxxxx Oxxx, at the Defendant's home at 1xx Mxxxxx Rxxx, Hxxxx, Kxxxx within Nairobi County "(the premises)".

50. The Office observes that the LinkedIn post was in two parts; the commentary and a section of the Plaintiff. The Commentary section did not contain the Complainants' or the minor's personal information. However, the section of the plaintiff that was attached to the commentary contained the minor's name and the Complainants' home address which constitutes personal information which the Complainants did not consent to the sharing of the information with third parties.

51. The Office takes cognisance of Section 79 of the Evidence Act, Cap 80 of the Laws of Kenya provides that public records include documents forming the acts or records of judicial officers. Similarly, Section 2 of Public Archives and Documentation Service Act, cap 19, Laws of Kenya provides for the definition of a public record as records specified in the schedule. The Schedule thereto includes the records of the High Court and of any other court or tribunal as public records. The Office concludes that pleadings submitted to the Kenyan High Court are public records in this regard.

52. Moreover, this Office held in its decision on *ODPC Complaint No. 677 of 2022* that individuals may not file complaints about breaches of personal data pertaining to information that is already in the public domain, particularly concerning records of the Kenyan High Court or tribunals as permitted by the Evidence Act and the Public Archives and Documentation Service Act, cap 19, Laws of Kenya.

53. Consequently, despite pleadings constituting public records, the Office finds that minors constitute a **special category** that should be protected because they may be less aware of the risks, consequences, safeguards, and rights associated with the processing of their personal data. It is imperative that any

information belonging to minors is processed in compliance with the Act, with the guardians and legal representatives consent being highly significant.

54. Be that it may, the Office finds that the any information involving minors should be anonymized in the event of sharing such information. Section 2 of the Act defines "**anonymisation**" as the removal of personal identifiers from personal data so that the data subject is no longer identifiable.

55. The Respondent contends that he understands the need to anonymize a minor's name for purposes of pleadings arises in matters concerning children under the Children's Act, 2022 and any amendments to the Plaint should be ordered by the High Court within the suit. The Office notes Section 95(5)(a) of the Children's Act 2022 which has safeguards and protection of the identity of a minor stating that:

"In relation to any proceedings concerning a child, whether instituted under this Act or under any other written law, a person shall not publish or reveal any publication or report, including any law report, any of the following matters: -

b) A child's name, identity, home or last place of residence or school."

56. Consequently, despite the fact that the Plaint filed before court did not adhere to Section 95(5)(a) of the Children's Act, 2022, this Office finds that amendment of pleadings in that regard is within the purview of the High Court handling the case between the Complainants and the Respondent's client.

57. With regards to the processing of personal data, this Office has the mandate of regulating personal data and to ensure that the processing of personal data of a data subject is guided by the principles as set out in Section 25 of the Act. Specifically, Section 25(c) of the Act provides:

"25. Every data controller or data processor shall ensure that personal data is:

.....c. collected for explicit, specified and for legitimate purposes and not further processed in a manner incompatible with those purposes."

58. Despite the Complaint that was shared by the Respondent constituting a public record, we are of the view that disclosure of the same without anonymizing minor's data constitutes a violation under the Act. The Office is also alive to the decision of the Supreme Court of Kenya on the minors right to privacy in **SC-Petition-13-E015-of-2022-Charles-Muturi-Macharia-6-Others-v-Standard-Group-4-Others** where a declaration was issued that the respondents violated the appellants' right to privacy as guaranteed under Article 31 (c) of the Constitution. In so doing the Supreme Court highlighted that the 1st-4th Respondents would have achieved the same goal of keeping the public informed by running the story without the children's names, photographs or identities, despite the fact that the information was provided in public proceedings by the State.

59. Therefore, with regards to the aforementioned, the Office finds that despite the disclosure of the Complaint by the Respondent on his LinkedIn platform being a public document, the disclosure of the minor's personal information contained therein without anonymization and consent of the Complainants amounted to a violation of the Act.

60. As stated hereinbefore, the matter of amendment of pleadings is a preserve of the High Court.

III. WHETHER THE COMPLAINT WAS SUFFICIENTLY ADDRESSED BY THE RESPONDENT

61. Section 40 of the Act provides for right of erasure and specifically 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.

62. The 1st Complainant claims that on 5th July 2023, she was informed about the Respondent's LinkedIn post by a friend. As a result, the Complainants filed an application in court on 7th July 2023, requesting that the aforementioned post be removed and a gag order be issued to the Respondent.
63. The Respondent, on the other hand, confirms that he made the said post on 4th July 2023 and further claims that he became aware of the said application on his own initiative on 10th July 2023, well before he was served with the said application on 19th July 2023, and that he immediately had his post deleted. The Respondent further produced email communication to the Complainants' Advocates verifying that the aforementioned post had been deleted on 10th July 2023.
64. Similarly, the Respondent avers that he was not approached to take down the said post. The Act under Section 40 of the Act contemplates such situations and provides that a data subject may request a data controller or data processor to erase or destroy without undue delay personal data in its possession.
65. Regulation 12 of the Data Protection (General) Regulations 2021 also provides for right of erasure whereby a data controller or data processor shall respond to a request for erasure within fourteen days of the request. Therefore, the Act and the Regulations contemplate situations where a party may be dissatisfied with the processing of their personal data and seek to exercise the right to have that personal data deleted, and further outlines the steps the data subject can take in that regard.

66. Moreover, the 1st Complainant expressed concern about the re-posts and hashtag use on the said post by other social media users. However, the Respondent claims that once he deleted the stated post, all re-posts by other users were automatically erased. The Office conducted investigations and found that the action of deleting a post or comment on the LinkedIn platform results into all subsequent re-posts, hashtags, likes, reactions, and comments also being deleted thereby leaving no trace of the said content on the said platform.

67. In this regard, the Respondent acted quickly in removing the aforementioned commentary, thereby fulfilling Section 40(b) of the Act on his own volition, which provides for the erasure or destruction without undue delay, of personal data that he was no longer authorized to retain, that was irrelevant, excessive, or obtained unlawfully.

68. In light of the foregoing, the Office concludes that the Respondent erased and/or destroyed the complainants' personal data in his control in accordance with Section 40 of the Act and the Regulations. Furthermore, the deletion of the post resulted in the removal of all reposts, likes, responses, and comments from the site, resolving the complaint. As a result, this Office concludes that the Respondent addressed the complaint adequately.

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

69. The complainants sought for an unconditional apology approved by themselves to be posted on LinkedIn admitting liability of the publication. This Office concludes that the same cannot be pursued with the Office since it is not a remedy contemplated by the Act.

70. Additionally, the Complainants requested that the Respondent be issued with an Enforcement Notice.

71. Whereas an Enforcement Notice is one of the remedies available under the Act, it does not apply in this instance because by deleting the impugned post, the Respondent has already taken the actions necessary to correct or eliminate the situation as stipulated in Section 58 of the Act..

72. Lastly, the Complainants sought for an award of compensation owing to the alleged unauthorized disclosure of their minor's personal data. The Office has considered the merits of the Complaint and the Response of the Respondent and the evidence adduced. From the initial receipt of the Complainants' complaint, steps undertaken to rectify and resolve the issue, and the Respondent's mitigation measures addressing violations under the Act.

73. Similarly, despite the Office making a finding that there was a violation under the Act, the Office also took into account the steps taken and the time to remedy the violation. Furthermore, the resultant effect of the deletion of the impugned post resulted in the removal of all reposts, likes, responses, and comments from the site thereby resolving the complaint.

74. From the foregoing, the request for compensation against the Respondent is denied because the Respondent took prompt action to remove the aforementioned post, which resolved the issue.

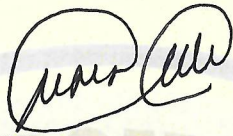
G. FINAL DETERMINATION

75. 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 stands resolved.
- ii. This determination be brought to the attention of the Court in *High Court Civil Case No. E094 of 2023 between Colleta Sebby Abonyo -v- Gabriel Oser & anor*

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

DATED at **NAIROBI** this 27th day of November 2023



Immaculate Kassait, MBS
DATA COMMISSIONER



