



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1761 OF 2023

RUPHUS MUITA.....COMPLAINANT

-VERSUS-

RISINE CREDIT LIMITED.....1ST RESPONDENT

WAKANDA CREDIT LIMITED.....2ND 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 the 26th September 2023, in accordance with Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (the Regulations). The Complaint relates to the alleged contacting of the Complainant by a money lending product of the 1st and 2nd Respondents.

B. LEGAL BACKGROUND

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 premised 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 Kashway, a product of the Respondents, unlawfully contacted him that he should inform somebody else of their overdue loan.

D. BACKGROUND OF THE COMPLAINT

7. This Office received a complaint from the Complainant on 26th September 2023. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter the 'Enforcement Regulations') from the Complainant who is the aggrieved data subject.
8. Risine Credit Limited (hereinafter the '1st Respondent') and Wakanda Credit Limited (hereinafter the '2nd Respondent') are digital credit providers with a money lending product known as Kashway.

9. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondents of the complaint filed against it *vide* letters dated 9th November, 2023 referenced ODPC/CONF/1/5 VOL 1 (551) and ODPC/CONF/1/5 VOL 1 (553). In the notifications of the complaint, the Respondents were to provide: -

- a. A response to the allegations made against them by the Complainant;
- b. Any relevant materials or evidence in support of the response;
- c. Details of how they obtained the Complainant's personal details;
- d. The legal basis relied upon to process and engage with the Complainant pursuant and whether they fulfilled their duty to notify under Section 29 of the Act;
- e. Whether the Complainant consented to the use of his personal details;
- f. The mitigation measures adopted to address the complaint;
- g. Details of all the product names/mobile money lending apps that are under their organizations; and
- h. The relationship between the Respondents as the money lending product was registered under the 1st Respondent in the Google PlayStore yet the Paybill was under the 2nd Respondent.

10. The Respondents did not respond to these allegations and therefore, this determination is pegged on Regulation 11 (2) of the Enforcement Regulations whereby the Data Commissioner shall proceed to determine the complaint in accordance with the Act and the Regulations, the non-responsiveness of the Respondent notwithstanding.

E. SUMMARY OF EVIDENCE ADDUCED

THE COMPLAINANTS' CASE

11. The Complainant submitted the filled complaint form and a screenshot of a message from Kashway_app directing him to inform a debtor to clear his Kashway loan which was overdue.

F. INVESTIGATIONS CONDUCTED

12. Once the complaint was lodged, it was paramount to establish the parent company of the money lending product – Kashway. Upon searching the application on Google PlayStore, it was established that the parent company was the 1st Respondent.

13. However, on the screenshot provided by the Complainant, there was a PayBill number which it was established belonged to the 2nd Respondent.

14. These investigations led to notifications of the complaint to both Respondents.

G. ISSUES FOR DETERMINATION

15. 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 Respondents fulfilled their 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

16. The Complainant is a data subject within the definition of the Act and therefore has rights under Section 26 of the Act. Particularly, the Complainant had the right to be **informed** of the use to which his personal data was to be put.

17. Personal data is defined under Section 2 of the Act as **any information** relating to an identified or an identifiable natural person.

18. The Complainant had the right to be informed of the use to which his personal data, particularly his phone numbers, was to be put.

19. The Respondents failed to respond to these allegations and therefore, this Office therefore finds that there was a violation of the Complainant's rights under Section 26 (a) of the Act.

II. WHETHER THE RESPONDENTS FULFILLED THEIR OBLIGATIONS UNDER THE ACT

20. The Respondents are data controllers and data processors within the definitions of the Act and therefore have obligations pursuant to the Act.

21. The Respondents have an obligation under Section 25 of the Act to adhere to the principles of data protection while processing the Complainant's personal data. Particularly, the Respondent is obligated under Section 25 (a) and (c) of the Act to ensure that personal data is processed in accordance with the right to privacy of the data subject and is collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes.

22. Further, Section 28 (1) of the Act provides that a data controller or processor shall collect personal data **directly** from the data subject.

23. With regards to the duty to notify, the Respondents had an obligation under Section 29 to, before collecting their personal data, notify the Complainant of, among others:

- a) his rights under Section 26 of the Act;
- b) the fact that his personal data was being collected;
- c) the purposes for which his personal data was being collected;
- d) the contacts of the Respondents and whether any other entity may receive the collected personal data; and
- e) a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

24. Section 30 of the Act gives instances where a data controller or processor can lawfully process personal data. It states that a data controller or 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 given in subsection (b).

25. 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.

26. Further, Section 41 of the Act as read with Part V of the Data Protection (General) Regulations, 2021 provides for data protection by design or by default.

27. The Respondents failed to respond to these allegations and therefore this Office finds that they did not fulfil their obligations under the Act.

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

28. Pursuant to Regulation 14 (2) of the Enforcement Regulations, a determination shall state the remedy to which the complainant is entitled. Further, the remedies are provided for in Regulation 14 (3) of the Enforcement Regulations.

29. Having found that the Respondents failed to fulfil their obligations under the Act, an Enforcement Notice shall be issued against the Respondents pursuant to Section 58 of the Act.

30. Further, Section 65 (1) of the Act provides for compensation to a data subject and states that a person who suffers damage by reason of a contravention of a requirement of the Act is entitled to compensation for that damage from the data controller. Section 65 (4) of the Act states that "damage" includes financial loss and damage not involving financial loss, including distress.

31. Regulation 14 (3) (e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

32. Based on the Respondent's violation and infringement of the Complainant's rights, and failure to cooperate with this Office, the Data Commissioner makes an order for nominal damages of Kshs. 25,000 to be paid by each of the Respondents to the Complainant.

H. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for violating the Complainant's rights and failing to fulfil its obligations under the Act.
- ii. An Enforcement Notice be issued against the Respondents.
- iii. An order for nominal damages of Kshs. 25,000 to be paid to the Complainant by each of the Respondents.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 11th day of December 2023.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

