



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1860 OF 2023

MUTHEU MUTUKU.....COMPLAINANT

-VERSUS-

CLUB LEGEND RONGAI.....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 6th October 2023 against the Respondent alleging that the Respondent wrongly posted the Complainant's image on its social media pages without her consent and upon request to pull down the said image, the Respondent failed to pull down the image.

B. LEGAL BASIS

2. Article 31 (c) and (d) of the Constitution of Kenya 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 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. This Office received a complaint from the Complainant on 6th October 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.
7. The Respondent is an entertainment club in Ongata Rongai while the Complainant was a customer at the said club.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *via* a letter dated 19th October, 2023 referenced **ODPC/CONF/1/5 VOL 1 (507)**. In the notification of the complaint, the Respondent was to provide: -
 - a. A response to the allegation made against them by the Complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. Details of how it collected, stored and processed the Complainant's data, and whether the Complainant consented to the publishing of her photo on its social media sites;

- d. The legal basis relied upon to process and engage with the Complainants as per Section 30 of the Act;
 - e. Whether or how it fulfilled the duty to notify the Complainant under Section 29 of the Act, specifically, the purpose for which her personal data was collected;
 - f. Details of:
 - i. The mitigation measures adopted or being adopted to address matters arising from the complaint;
 - ii. Technological and organizational safeguards put in place to ensure that such occurrence mentioned in the complaint do not take place again; and
 - iii. Its data protection policy outlining the complaints handling mechanism to deal with matters relating to the rights of a data subject under the Act and the Regulations.
 - g. Demonstration of its level of compliance with the requirements under the Act and the Regulations.
9. The Respondent was served the above stated letter on 25th November 2023 and a subsequent reminder letter dated 4th December 2023 referenced **ODPC/CONF/1/5 VOL 1 (610)** on 6th December but failed to respond to the above allegations.
10. 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.

D. NATURE OF THE COMPLAINT

11. The Complainant alleged that the Respondent ignored her request to have her images posted without her consent pulled down from their social media pages for a year.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

12. The Complainant provided a screenshot of the request to have her image deleted sent to the Respondent on 5th November 2022. She also provided an email dated 27th September 2023 sent to the Respondent stating that her request to have her images deleted had been ignored.

13. The Complainant also adduced evidence of her photograph being proof that she was the one who was posted on the Respondent's social media site.

ii. THE RESPONDENT'S RESPONSE

14. The Respondent was sent a notification on the 19th October 2023 and a reminder sent on 4th December 2023. However, despite being aware of the Complaint, the Respondent did not respond.

F. 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 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 has rights under Section 40 (1) (b) of the Act which provides for the right of rectification and erasure and states that a data subject may request a data controller or data processor to erase **without undue delay** personal data that the data controller or processor is no longer authorised to retain.

17. Further, Regulation 12 (1) (b) of the Data Protection (General) Regulations, 2021 (the 'General' Regulations) provides that pursuant to Section 40 (1) (b) a data subject may, request a data controller or processor to erase or destroy personal data held by the data controller or processor where the data subject

withdraws their consent that was the lawful basis for retaining the personal data.

18. Section 32 (2) of the Act states that unless otherwise provided in the Act, a data subject **shall** have the right to withdraw consent at any time.

19. In this complaint, the Complainant no longer wanted her image to be posted on the Respondent's social media page and therefore exercised her right and requested the Respondent to pull down the said image.

20. The Respondent did not pull down the Complainant's image for over a year hence necessitating lodging of the complaint to this Office. The aspect of undue delay was also not adhered to by the Respondent.

21. Section 37 (1) (a) of the Act provides for commercial use of data and provides that a person **shall not** use, for commercial purposes, personal data obtained pursuant to the provisions of this Act **unless** the person has sought and obtained express consent from a data subject.

22. The Respondent failed to prove that it sought and obtained express consent from the Complainant to publish her image on its social media sites.

23. This Office therefore finds that the Complainant's rights under Sections 32 (2) and 40 (1) (b) of the Act as read with Regulation 12 (1) (b) of the General Regulations were violated by the Respondent.

24. The Office also finds the Respondent did not get the requisite consent from the Complainant as required by Section 37 (1) (a) of the Act in the commercial use of personal data by data controllers.

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

25. 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. The Complainant requested for an order for compensation in that regard.

26. 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.

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

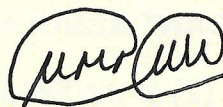
28. In view of the foregoing, this Office concludes and finds that the Complainant is entitled to the remedies under the Act. Particularly, the Respondent is hereby ordered to compensate the Complainant **KES 500,000 (Five Hundred Thousand Shillings Only)** for use of the Complainant's image for commercial gain without her consent and for the infringement and/or violation of her privacy rights.

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for using the Complainant's image for commercial gain without her consent and failing to pull down the said image upon the Complainant's request hence violating her rights under the Act;
- ii. The Respondent is ordered to compensate the Complainant **KES 500,000 (Five Hundred Thousand Shillings Only)**
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 29th day of December 2023.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER