REPUBLIC OF KENYA

**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 1973 OF 2023**

**MERCY WAMBUA.....1ST COMPLAINANT**
**MERCY WAMBUA SUING ON BEHALF OF N.R (MINOR)....2ND COMPLAINANT**
**MERCY WAMBUA SUING ON BEHALF OF K.W (MINOR)....3RD COMPLAINANT**

**-VERSUS-**

**BOLD DECISIVE DIGITAL LAB .....1ST RESPONDENT**
**EQUITY AFIA.....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 1st Complainant filed a complaint against the Respondents for violating her and the minors' right to privacy. She alleged that the 1st Respondent utilized a photo of her and her two children for marketing purposes in order to seek business from the second respondent without her knowledge or consent.

### 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. 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.

4. 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.

**C. BACKGROUND OF THE COMPLAINT**

5. The Office received a complaint by 1st Complainant Mercy Wambua (hereinafter 'the 1st Complainant') on 10th October 2023 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') on behalf of herself and her children who were the aggrieved data subjects.

6. Bold Decisive Digital Lab (hereinafter the '1st Respondent') is a marketing agency and Equity Afia (hereinafter the '2nd Respondent') is a health services provider.

7. The Office *vide* letters dated 7th November 2023 notified the Respondents of the complaint filed against them by the 1st Complainant.

8. The Office requested the Respondent to provide:

    a. A response to the allegations made against it by the 1st Complainant
    b. Any relevant materials or evidence in support of its response.
    c. The legal basis relied upon to process and engage with the 1st Complainant as per Section 30 of the Act.
    d. Mitigation measures adopted or being adopted to address the complaint to the satisfaction of the 1st Complainant and to ensure that such occurrence mentioned in the complaint does not recur.

9. The 1st Respondent through its advocates responded to the notification of complaint letter vide a letter dated 22nd November, 2023.

10. The 2nd Respondent responded to the notification of complaint letter vide a letter dated 27th November, 2023.

11. This determination is therefore as a result of analysis of the complaint as received, the responses from the Respondents and investigations conducted by the Office.

## D. NATURE OF THE COMPLAINT

### I. COMPLAINANTS' CASE

12. The 1st Complainant came across her image and that of the 2nd and 3rd Complainants (Collectively, 'the Complainants') on a pamphlet bearing the company logo of the 2nd Respondent allegedly acquired at one of the 2nd Respondent's branches.

13. The pamphlet contained a picture of her and her two children, which she has previously posted on her social media page. The 1st Complainant states that on the face of it, the pamphlet was a marketing proposal from the 1st Respondent.

14. The 1st Complainant states that she posts pictures of herself and at times those of her children on her social media, but she has never consented to public consumption of either her pictures or those of her children through marketing and advertisement agencies.

15. The 1st Complainant states that at the first instance of learning about this, she reached out to the 1st Respondent but she did not receive any response.

16. The 1st Complainant avers that her right to privacy has been infringed and thus the basis of this determination.

### II. RESPONDENTS' RESPONSE

#### a) The 1st Respondent's Response

17. The 1st Respondent in its response through its advocates dated 22nd November 2023 to this Office states that the 1st Complainant had previously through her advocates served a demand letter alleging publicized postage and advertisement of her photo on social media, an infringement of her right and her children's right to human dignity and privacy.

18. The 1st Respondent further states that the document referred to by the 1st Complainant was a proposal document to Equity Afia and not a marketing brochure as alleged, and that it is indicated as such on the face of the document.

19. The 1st Respondent avers that the proposal document was an internal and confidential document meant solely for purposes of a private pitch and illustration to Equity Afia only, and was not meant for any public consumption whatsoever.

20. The 1st Respondent further avers that only two copies of the proposal document were delivered to Equity Afia's head office at Equity Centre and the same was never delivered to any health facility or public area as alleged by the 1st Complainant.

21. The 1st Respondent states that it is not its policy to use any person's photos publicly without obtaining their due consent, and such consent would invariably have been sought from the 1st Complainant should there have been any intention of public and/or commercial use of the photo.

22. Lastly, the 1st Respondent states that there was no commercial benefit, profit or enrichment whatsoever derived from the proposal document since the same was never adopted by the 2nd Respondent.

**b) The 2nd Respondent's Response**

23. The 2nd Respondent in its response dated 27th November 2023 states that, with regard to the complaint in reference, it does not have any formal or informal engagement with the 1st Respondent.

24. The 2nd Respondent states the 1st Respondent reached out to it with a proposal to conduct a marketing campaign. That a physical meeting was held where it was made clear that it would not formally or informally engage with the 1st Respondent. In light of this, the 2nd Respondent avers that it does not have any partnership with the 1st Respondent as it was never formally engaged as a vendor.

## D. SUMMARY OF EVIDENCE ADDUCED

### I. THE 1ST COMPLAINANTS' EVIDENCE

25. As part of the 1st Complainant's evidence, he attached:

a. Printed screenshot pictures of the pamphlets/brochures in question.

b. Birth certificate of N.R.

c. Birth Certificate of K.W.

### II. THE RESPONDENTS' EVIDENCE

26. As part of the 1st Respondent's evidence, annexures were attached:

a. Letter dated 22nd November 2023.

b. The 1st Complainant's demand letter.

c. 1st Respondent's response to the demand letter dated 8th February 2023.

## E. ISSUES FOR DETERMINATION

27. 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 the Complainants' claim on infringement of their right to privacy by the Respondent has merit according to the Act;

ii. Whether the respondent in its actions or otherwise caused a personal data breach against the Complainants.

iii. Whether the Complainants are entitled to the remedies sought for the alleged breach.

## I. WHETHER THE COMPLAINANTS' CLAIM ON INFRINGEMENT OF THEIR RIGHT TO PRIVACY BY THE RESPONDENT HAS MERIT ACCORDING TO THE ACT

28. Data subject's rights are outlined under Section 26 of the Act and they are: -
    a. *to be informed of the use to which their personal data is to be put*
    b. *to access their personal data in custody of data controller or data processor*
    c. ***to object to the processing of all or part of their personal data***
    d. *to correction of false or misleading data; and*
    e. *to deletion of false or misleading data about them*

29. In accordance with the data protection principles under Section 25 of the Act, 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*

30. With regard to the complaint herein, the 1st Complainant alleges that the Respondent collected and processed her personal data without her consent. In its defence the 1st Respondent states that the 1st Complainant's photo was publicly available online. The 1st Complainant had posted a photo of herself and her two children the 2nd and 3rd Complainant respectively, on her social media

page and the 1st Respondent affirms that this is the same place it sourced the photo from.

31. The existence of the right to privacy means that there exists a duty either not to disclose information or prevent unauthorized access.

32. Section 28(1) of the Act provides that data controller or data processor shall collect personal data directly from the data subject. Section 28(2) (b) provides personal data may be collected indirectly where the data subject has deliberately made the data public.

33. Regulation 6(3) of the the Data Protection (General) Regulations, 2021 provides, where a data controller or data processor collects personal data indirectly, the data controller or data processor shall within fourteen days inform the data subject of the collection.

34. The 1st Complainant states that she posts pictures of herself and her children on her personal social media but laments that the same should not be taken as an invitation for her pictures to be used for marketing and advertisement without her express consent.

35. Section 30(a) of the Act provides, a data controller or data processor shall not process personal data, unless the data subject consents to the processing for one or more specified purposes.

36. Section 32 of the Act provides, 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. With regards to this position the 1st Respondent alleges that it seeks for consent from data subjects when it intends to publicize data subjects' personal data. However in this instance it did not provide such proof.

37. Section 30(2) provides for circumstances where personal data maybe processed without prior consent of the data subject.

*A data controller or data processor shall not process personal data, unless 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 interests of the data subject; or*

viii. *for the purpose of historical, statistical, journalistic, literature and art or scientific research.*

38. In relation to the minors, 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. In this case the 1st Complainant has proven to have the authority by providing the minors' birth certificates.

39. 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.

40. 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 1st Respondent to prove that they had consent from the 1st Complainant to share image that contained the 2nd and 3rd Complainants herein.

41. The 1st Respondent, in its response has significantly not dispensed that the reasons for processing of the 1st Complainant's data fall under the category described in Section 30(2) of the Act. Therefore, the claim against the 1st Respondent is merited as they did not discharge that burden.

42. On the other hand, the 2nd Respondent did not have any contractual commitment to the 1st Respondent regarding the complaint. In addition, the 2nd Respondent further claims that it did not collect, process, or store any personal data belonging to the Complainants, nor did it cause to be collected, processed, or stored, because it and the 1st Respondent do not have a partnership. The 2nd Respondent did not explicitly or informally engage the 1st Respondent as a vendor.

43. Section 37 of the Act requires express consent for commercial use of personal data. Despite the claim by the 1st Respondent that the images were solely used for purposes of a proposal, this Office concludes that the aim was to exploit the photos commercially if the 2nd Respondent engaged the 1st Respondent's services based on the aforementioned proposal.

44. In view of the foregoing, the Office finds that the 1st Respondent had a duty and responsibility as a data controller and processor to the Complainants as data subjects and it was indeed, according to the Act and Regulations, mandatory for it to seek for consent from the 1st Complainant. The complaint against the 1st Respondent is therefore merited.

45. The 2nd Respondent in this case had no legal obligation to the Complainants. This is due to the fact that the 2nd Respondent never formally or informally engaged the 1st Respondent in any partnership or otherwise. Further, it neither

collected, processed, or stored, nor caused to be collected, processed, or stored, any personal data pertaining to the Complainants.

46. In view of the foregoing, the claim against the 1st Respondent is merited while the claim against the 2nd Respondent is unfounded.

## II. WHETHER THE RESPONDENT IN ITS ACTIONS OR OTHERWISE CAUSED A PERSONAL DATA BREACH AGAINST THE COMPLAINANTS

47. Section 2 of the Act defines **"personal data breach"** to mean a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed.

48. The 1st Complainant states that the 1st Respondent used and published her photos with her children without prior consent for commercial purposes. The Respondent states in its response that it never intended on using the photo for commercial gain and if the photo would have been for commercial purpose, it would have invariably and mandatorily sought for express consent from the 1st Complainant.

49. The 1st Respondent's position contravenes Sections 28, 29, 30 and 32 of the Act and Regulation 6(2) of the Data Protection (General) Regulations, 2021 as discussed above.

50. Since the 2nd Respondent never formally or informally engaged the 1st Respondent on any partnership or otherwise, and neither, collected, processed or stored, nor caused to be collected, processed or stored any personal data pertaining to the Complainants, it owed no duty or obligation to the Complainants according to the Act.

51. The 1st Respondent in its response states that the Complainants' photo was publicly available online on the 1st Complainant's social media page. However, the 1st Complainant states that regardless of her posting her pictures, she does

not invite marketers and/or advertisers to use her pictures and/or that of her children for their own purposes without her express consent.

52. Also, the 1st Respondent did not at any point notify the 1st Complainant that its collecting her data and that of her children indirectly and the same will be processed for a confidential purpose fourteen (14) days from the date of collection.

53. According to Section 41(1) of the Act, every data controller or data processor shall implement appropriate technical and organizational measures which are designed to implement the data protection principles in an effective manner; and to integrate necessary safeguards for that purpose into the processing.

54. Section 41(2) further mandates, that the duty under subsection (1) applies both at the time of the determination of the means of processing the data and at the time of the processing.

55. Section 41(4) provides, To give effect to this section, the data controller or data processor shall consider measures such as—

    i. *to identify reasonably foreseeable internal and external risks to personal data under the person's possession or control*
    ii. *to establish and maintain appropriate safeguards against the identified risks*
    iii. *to the pseudonymization and encryption of personal data*
    iv. *to the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident*
    v. *to verify that the safeguards are effectively implemented; and*
    vi. *to ensure that the safeguards are continually updated in response to new risks or deficiencies*

56. In view of the foregoing, the Office finds that the 1st Respondent in its actions or otherwise occasioned an infringement on the Complainants' rights under the Act. The 2nd Respondent however, did not in its action or otherwise cause any personal data breach to the 1st Complainant accordance to the Act.

## III. WHETHER THE COMPLAINANTS ARE ENTITLED TO THE REMEDIES SOUGHT FOR THE ALLEGED BREACH

57. Section 3(e) of the Act provides that the object and purpose of this Act is to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with this Act.

58. Regulation 14(1) of the Enforcement Regulations provides; that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations. Sub-regulation 2(d) provides; a determination under sub-regulation (1) shall be in writing and shall state the remedy to which the 1st Complainant is entitled.

59. Regulation 14(3) of the Enforcement Regulations provides; that the remedies contemplated under sub-regulation (2)(d) may include –
    a. issuance of an enforcement notice to the Respondent in accordance with the Act and Regulations
    b. issuance of a penalty notice imposing an administrative fine where a respondent fails to comply with the enforcement notice
    c. dismissal of the complaint where it lacks merit
    d. recommendation for prosecution; or
    e. an order for compensation to the data subject by the respondent.

60. The 1st Complainant made the following requests on the remedies she wish be granted by the Office:
    i) that the Respondents be found liable and;
    ii) for compensation for violation of her rights under the Act

61. In view of the foregoing, and guided by the Act, the Office finds that the Complainants sufficiently dispensed the allegations against the 1st Respondent. The Complainants did not however sufficiently dispense the allegations against the 2nd Respondent and as such the complaint against the 2nd Respondent lacks merit. Herewith, the same stands dismissed.

62. In view of the foregoing, this Office concludes that the Complainants' are entitled to the remedies as envisioned under the Act. That being said, the 1st Respondent is hereby directed to compensate the Complainants Kshs. **1,900,000.00/= (One Million Nine Hundred Thousand Shillings Only)** for the use of their images for commercial gain without her consent and for the infringement and/or violation of his rights.

## F. FINAL DETERMINATION

63. 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 1st Respondent, Bold Decisive Digital Lab, is hereby found liable for using the Complainants' image for commercial gain without their knowledge and consent thereby violating her rights as envisaged in the Data Protection Act No. 24 of 2019.

ii. The 1st Respondent, Bold Decisive Digital Lab is ordered to compensate the Complainants in the following amount –

**1st Complainant - KES 500,000.00**
**2nd Complainant - KES 700,000.00**
**3rd Complainant - KES 700,000.00**
**Total – KES 1,900,000.00 (One Million, Nine Hundred Thousand Shillings)**

iii. The complaint against Equity Afia, the 2nd Respondent herein, is hereby dismissed.

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

**DATED** at **NAIROBI** this 6th day of January **2024**

**IMMACULATE KASSAIT, MBS**

**DATA COMMISSIONER**