



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 2052 OF 2023

GEORGE MAINA MWANGI..... COMPLAINANT

-VERSUS-

CUSTOMS MANAGER, ICMS LICENSING – KRARESPONDENT

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 the Respondent continued exposing his profile that included his personal data to a third party in complete disregard to his request to pull down his profile & replace it with that of his replacement in the system.

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 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 George Maina (hereinafter 'the Complainant') on 12th 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') from the Complainant who is the aggrieved data subject.
6. Pursuant to Regulation 11 of the Enforcement Regulations, on 27th November 2023, this Office notified the Respondent of the complaint filed against it *vide* a letter dated 27th November 2023 referenced ODPC/CONF/1/5 VOL 1 (586) and required their response within 14 days.
7. The Respondent responded to the notification of the complaint letter *vide* a letter dated 29th November 2023 and received by this Office on 21st December 2023.
8. This determination is therefore 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

9. It is the Complainant's case that the Respondent continued exposing his ICMS profile to a third-party person who replaced him when he terminated his services with the Respondent. The Complainant further alleged that requests for his profile to be pulled down and substituted with that of his replacement in the system was disregarded.

II. RESPONDENT'S CASE

10. In the response, the Respondent stated as below as regards the substance of the Complaint:

- (i) The request for Complainant's profile to be pulled down was effected on 7th May 2021 as per a letter of the same date before they received the Complainant's letter requesting for the disabling and revocation of his profile on 13th May 2021. The Complainant's request letter was dated 12th May 2021;
- (ii) The complainant's profile was substituted with that of his replacement in the system which substitute was created on 7th May 2021 and super user rights transferred on the same date;
- (iii) The Complainant's profile no. CSAP051236746GA was consequently deactivated while profile No. MUBP051169840EA was rendered in-active since both accounts were closed while the profile No. CSA P051236746GA is disabled because the operating license expired and the system automatically changes the status;
- (iv) There is availability of accompanying relevant documentation in support of the above actions.
- (v) That the complainant's requests having been effected on the cited dates the present complaint is moot having been overtaken by events as the matter has been resolved.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

11. As part of his evidence, the complainant adduced:-

- a) A screenshot and a copy thereof of the impugned profile's user information.
- b) A copy of his letter dated 12th May 2021 requesting the Respondent to disable and or revoke his profile. The letter shows it was received on 13th May 2021.

- c) E-mail correspondences between the Complainant and Gone fishing & iCMS.
- d) Gone fishing letter dated 11th May 2021.

II. THE RESPONDENT'S EVIDENCE

12. In response to the Complaint, the Respondent adduced the following evidence to support its position:-

- a) Gone Fishing letter dated 7th May 2021.
- b) Complainant's letter dated 12th May 2021 requesting the Respondent to disable and or revoke his profile.
- c) Email thread capturing the resolution of the complainant's request.

F. ISSUES FOR DETERMINATION

13. 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 rights were infringed upon; and
- ii. Whether the Complainant is entitled to any remedy under the Act.

G. ANALYSIS AND DETERMINATION

I. WHETHER THE COMPLAINANT'S RIGHTS WERE INFRINGED UPON

14. Section 26 of the Act outlines the rights of a data subject. The Act states that:

A data subject has a right—

- (a) *to be informed of the use to which their personal data is to be put;*
- (b) *to access their personal data in the custody of the 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.*

15. From the above summary of the complaint, the crux of this complaint relates to the right to object to the processing of all or part of the Complainant's personal data and the right to deletion of data relating to them.
16. To contextualize the complaint, the Complainant alleges that his request for the revocation of his profile in the Integrated Custom Management System (ICMS) of Gone Fishing (K) Limited (Hereafter 'Gone Fishing') was not adhered to despite him requesting the Respondent to do so. By writing to the Respondent and requesting the revocation of his profile, the Complainant was exercising his right to object to the processing of his personal data and the right to deletion of his personal data.
17. "Data" is defined in Section 2 of the Act to mean information which—
- (a) is processed by means of equipment operating automatically in response to instructions given for that purpose;*
 - (b) is recorded with intention that it should be processed by means of such equipment;*
 - (c) is recorded as part of a relevant filing system;*
 - (d) where it does not fall under paragraphs (a), (b) or (c), forms part of an accessible record; or*
 - (e) is recorded information which is held by a public entity and does not fall within any of paragraphs (a) to (d).*
18. "Personal data" is defined as "any information relating to an identified or identifiable natural person." (emphasis)
19. "An identifiable natural person" is further defined as " a person who can be identified directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social or social identity." (emphasis)
20. Simply put, personal data is any information relating to a person's name, an identification number, location data, an online identifier, or to one or more factors

specific to the physical, physiological, genetic, mental, economic, cultural or social, or social identity.

21. A look at the screenshot and/or copy of the ICMS system portal user information page adduced to this Office, it is evident that the Complainant's personal data was required as part of the log in details for him to be able to access his profile. By the Complainant requesting for the deletion and or revocation of his profile he was exercising his rights well within the law.
22. It was the Respondent's position that by the time the Complainant was exercising his right, it had already deleted and/or disabled his account from its system.
23. We have had a chance to interrogate all the evidence that was brought before this Office. From the evidence adduced, the Respondent commenced the process of revocation, deletion and change of the Complainant's profile as a super user on 7th May 2021 when Gone Fishing's factory manager wrote to the Respondent wanting to change the super user of its account from the Complainant to another person. On 11th May 2021, Gone Fishing's managing director wrote another letter to the Respondent wanting the issue of change of user to be addressed. The content of the two letters was similar.
24. We further note that on the same 11th May 2021, in addition to writing to the Respondent, Gone Fishing's managing director also wrote an e-mail to the Complainant informing him that they had initiated the process of deletion and/or change of the user profile from his credentials to a different person's.
25. The contents of the 11th May 2021 e-mail sent to the Complainant by Gone Fishing's managing director were, to wit :-

" Dear George. We have been reviewing our needs with iCMS now that we are making increasing use of this facility. It has not been easy trying to outsource this service and having taken advice from KRA themselves we have decided xxxxxxxx should take over the role of super user and manage all the entries from here. See attached letter. We would like to thank you for your support that you have given

us to get to this stage. If you would like me to write you a letter of recommendation or to use me as a referee, please let me know.....”

26. From this e-mail it is evident that Gone Fishing's were informing the Complainant of the decision they had decided to take and that they had started the process of change with the Respondent.
27. The Office notes that the Respondent effected Gone Fishing's request for deletion and change of user on 7th May 2021 upon receiving the factory manager's correspondence which was communicated earlier on 7th May 2021. This is evident from the iCMS portal copy adduced where the portal reads that that a new user was created on 7th May 2021 for the license period lapsing/ expiring on 31st December 2021. We note that the licensing period for Gone Fishing in the iCMS system was lapsing on 31st December 2021. By changing the super user, it only changed the operational rights of who is the super user. It did not change the licensing period.
28. Further from the evidence adduced in this Office, it is noted that when the Respondent's changed the user rights from the Complainant to another person as requested by the factory manager and the managing director, the same was confirmed as already actioned by the Respondent. Email threads have been adduced to this effect.
29. With respect to the Complainant's complaint, it was his position that the Respondent refused to honour his request for revocation and disabling his profile as a super user of gone fishing.
30. A claim for violation of the right to object to processing, rectification and/or erasure is tenable where a data subject has sought to exercise the right under Section 40 of the Act as read with Regulations 8, 10 and 12 of the Data Protection (General) Regulations, 2010 . From the evidence adduced to this Office we note that the Complainant exercised his right on 13th May 2021 when his request for revocation and disabling was received by the Respondent. On this day, 13th May 2021, when the Complainant was exercising his rights, the Respondent had

already actioned Gone Fishing's request. It had already changed the super user from the Complainant to another person.

31. The evidence shows that the deactivation and change of the user account was effected on 7th May 2023. The Complainant exercised his right on 13th May 2021 after change had already been effected. As such, it therefore follows that the Respondent did not violate the Complainant's rights. Rights are only violated when they are exercised and the same are not effected.

II. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDY UNDER THE ACT.

32. 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.

33. Having found that there was no violation of the Complainant's rights and therefore no infringement or damage was incurred this Office concludes that the Complainant is not entitled to any remedy under the Act.

H. FINAL DETERMINATION

35. In the ultimate, the Data Commissioner therefore makes the following final determination:

- i. The Complaint lacks merit and as such it is dismissed.
- ii. Parties have the right to appeal this determination to the High Court of Kenya within 30 days.

DATED at **NAIROBI** this 9th day of January **2024**



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER