



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 2101 OF 2023

ALLAN TIROP.....COMPLAINANT

-VERSUS-

PORT FLORENCE COMMUNITY HOSPITAL.....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 17th October 2023 alleging that the Respondent used the Complainant's image on its social media page without his consent.

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 17th October 2023. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainant who was the aggrieved data subject.
7. The Respondent is a non-profit organization that provides in-patient and out-patient medical services.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 6th November 2023 referenced **ODPC/CONF/1/5 VOL 1 (522)**. In the notification of the complaint, the Respondent was informed that if the allegations by the Complainant were true, they were in violation of various Sections of the Act. Further, the Respondent was asked to provide this Office with the following:
 - a. A response to the allegation made against them by the Complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. The mitigation adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint do not take place again; and
 - d. The contractual agreement (if any) between themselves and the Complainant to process and publish his image on their social media pages.

9. The Respondent was served the above stated letter on 9th November 2023 but failed to respond to the above allegations.

10. This determination is pegged on the provisions of Regulations 11(2) and 14 of the Regulations which state that where the Respondent does not respond to the notification of complaint, the Data Commissioner shall proceed to determine the complaint in accordance with the Act and the Regulations and 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, in a bid to enhance its outreach and expand its clientele, embarked on the use of social media platforms in advertising for commercial growth as well as information to the customers of its services.

12. It is upon the above premise that the Respondent used the Complainant's image on its social media website, allegedly, without his prior consent.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

13. The Complainant alleged that the Respondent runs a Meta account, in its name. The Complainant provided a link to the said Meta page.

14. The Complainant stated that as at 24th June 2022, 1,794 people liked the Respondent's page and another 1,861 followed it actively. The page as run and operated by the Respondent was a public page and as such, open to viewership by the public for the Respondent's commercially produced and offered services in Kenya.

15. The Complainant alleged that on or about 8th June 2021, the Respondent posted on its page labelled photos that were accessible through a link that he provided. The photo was captioned; "***Find us in Siaya for reliable and affordable medical and diagnostic services. For ultrasound services***"

and X-Ray services talk to us @portflorencehospitals. Our doctors and nurses are caring and compassionate towards nursing you to health."

Attached to the said caption was a photo that the Complainant alleged was his image. He provided a link to the said post.

16. The Complainant alleged that the Respondent caused itself to use an image of the Complainant in its Meta public page on the said date in a manner to impute that the Complainant was an employee of the Respondent, offering his professional services as a radiographer in the Respondent's radiology department.
17. The Complainant averred that he is neither an employee of the Respondent nor had he in any form granted the Respondent permission to use his image in a manner to portray that he was the Respondent's employee, servant or agent.
18. The Complainant also averred that the use of his image in the Respondent's public social media page was likely to mislead the public that he was the Respondent's employee offering his professional services with the Respondent.
19. Additionally, the Complainant also adduced evidence of his photograph being proof that he was the one who was posted on the Respondent's social media site.
20. The Complainant stated that the Respondent was/is employed in one of the leading hospitals in Kenya, and the continued use of his image is likely to affect his employment with his current employer on account of conflict of interest and he therefore suffered loss and damage.
21. The Complainant stated that the Respondent refused and/or neglected to pull down the images despite demand. The Complainant availed a demand letter dated 24th June 2022 demanding that the Respondent pull down his image from their social media page.

22. The Complainant indicated the remedies he sought for the alleged breach as:

- i. A declaration that the Respondent's actions amounted to breach of the Complainant's fundamental right to privacy under Article 31 of the Constitution;
- ii. An order for compensation to the data subject by the Respondent; and
- iii. Issuance of an Enforcement Notice to the Respondent in accordance with the Act and the Regulations.

ii. THE RESPONDENT'S RESPONSE

23. The Respondent was sent a notification on 6th November 2023.

24. Through a letter dated, the Respondent requested this Office for an extension of 14 days to respond to the complaint. However, pursuant to Regulation 11 (1) of the Enforcement Regulations, a Respondent is required to respond to a notification of complaint within **twenty-one days (21)** from the date of receipt of the letter.

25. The Office granted the Respondent a further seven (7) days to respond to the notification which they failed and/or neglected to do so.

26. The Office upon investigations established that the said images are still up on the Respondent's social media page to date.

F. ISSUES FOR DETERMINATION

27. In light of the above, 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 Respondent fulfilled its 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

28. Section 26 of the Act provides for the rights of a data subject under the Act. As such, the Complainant had the right to be informed of the use to which their personal data was to be put, to object to the processing of all or part of their personal data and to deletion of false or misleading data about them.
29. Further, Section 40 (1) (a) of the Act provides for the right of rectification and erasure and states that a data subject may request a data controller or data processor to rectify **without undue delay** personal data in its possession or under its control that is inaccurate, out-dated, incomplete or **misleading**.
30. 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 objects to the processing of their data and there is no overriding legitimate interest to continue the processing and the processing of personal data is for direct marketing purposes and the individual objects to that processing.
31. The Complainant in this case is a data subject as per the definition of the Act and was well within his rights in requesting the Respondent, who is a data controller and processor, to pull down or delete his images from the social media page. The Respondent failed, refused and/ or neglected to pull down the said image even after notification of the complaint from this Office. As at the date of this determination, the Complainant's image is still on the Respondent's social media page.
32. Section 30 of the Act states that a data controller or processor shall not process personal data, **unless** the data subject **consents** to the processing for one or more specified purpose or the processing is necessary for the reasons specified under Section 30 (1) (b) of the Act.

33. Section 32 (1) of the Act provides for the conditions of consent and states that a data controller or processor **shall bear the burden of proof** for establishing a data subject's consent to the processing of their personal data.

34. In this complaint, the Respondent did not prove to this Office that it had consent from the Complainant to publish his photo on its social media page and pass off the Complainant as one of its employees.

35. In light of the above, this Office therefore finds that the Respondent violated the Complainant's rights as stipulated under the Act.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

36. Section 25 (a) of the Act provides that every data controller or processor shall ensure that personal data is processed in accordance with the right to privacy of the data subject. The Respondent did not process the Complainant's personal data in accordance with his right to privacy and failed to respond to the complaint to prove otherwise.

37. Further, Section 28 (1) of the Act states that a data controller or data processor shall collect personal data **directly** from the data subject. The Respondent failed to respond to the notification of complaint and inform this Office where it got the Complainant's image to use it in their social media page.

38. The Respondent had an obligation under section 29 of the Act to inform the Complainant, before collecting his personal data, his rights under Section 26, the fact that his personal data was being collected and the purpose of collection of his personal data. From the analysis of the evidence adduced to this Office, the Respondent failed to fulfil this obligation.

39. 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. The Respondent failed to prove that it sought and obtained express consent from the Complainant to publish his image on its social media site.

40. Section 41 of the Act provides for data protection by design or by default and states that every data controller or processor shall implement appropriate technical and organisational 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.

41. This Office finds that the Respondent has not implemented the appropriate measures because despite the Complainant's demand, and the notification of complaint from this Office, the Respondent continues to use the Complainant's image unlawfully on its social media page.

42. This Office therefore finds that the Respondent did not fulfil its obligations mandated upon them by the above provisions of the Act and the Regulations.

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

43. 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.

44. The Complainant requested this Office to make a declaration that his right to privacy under Article 31 of the Constitution was violated. This Office does not make declarations of such nature as this is a preserve of the courts.

45. Having found the Respondent liable for violation of the Complainant's rights under the Act, he is entitled to compensation under Section 65 of the Act which 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. Further, Regulation 14 (3) (e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

46. In view of the foregoing, considering that the Respondent failed to pull down the Complainant's image for more than a year despite the Complainant's demand and a notification of complaint from this Office, for using the Complainant's image for commercial purposes without his express consent, and for infringement of the Complainant's right to deletion, the Respondent is hereby ordered to compensate the Complainant **Kshs. 750,000 (Five Hundred Thousand Shillings Only)**.

47. Having found that the Respondent did not fulfil its obligations under the Act, an Enforcement Notice shall be issued against it.

G. FINAL DETERMINATION

48. 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 his consent and failing to pull down the said image upon the Complainant's request hence violating his rights under the Act;
- ii. The Respondent is hereby ordered to compensate the Complainant **Kshs. 750,000 (Seven Hundred and Fifty Thousand only)**;
- iii. An Enforcement Notice shall be issued against the Respondent; and
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 14th day of January 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

