



**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 2109 OF 2023**

EMILY SILA.....COMPLAINANT

-VERSUS-

ZEROX TECHNOLOGY COMPANY LIMITED.....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 18th October 2023 alleging the Respondent was contacting the Complainant and sending her numerous messages regarding a loan that she had no knowledge of.

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 digital credit provider with a money lending product known as Apesa.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it vide a letter dated 20th December 2023 referenced ODPC/CONF/1/5 VOL 1 (652). 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. Details of how it obtained the Complainant's personal details;
 - d. The legal basis relied upon to process and engage with the Complainant and whether they fulfilled the duty to notify under Section 29 of the Act;
 - e. Whether the Complainant consented to the processing of their personal data; and
 - f. 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.
9. The Respondent was served the above stated letter on 20th December 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 lodged her complaint via email and attached a screenshot of a message directing her to inform a debtor to clear her loan as the person provided all her details to the money lending company.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

12. The Complainant alleged that the money lending product – Apesa owned by the Respondent was sending her constant text messages regarding the debtor who owed the Respondent money. She provided screenshots of the said text messages as proof of the same.

ii. THE RESPONDENT'S RESPONSE

13. The Respondent was sent a notification of complaint on 20th December 2023 but failed to respond to the said notification.

F. ISSUES FOR DETERMINATION

14. 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

15. 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 her personal data was to be put.

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

17. The Complainant had the right to be informed of the use to which her personal data, particularly her phone number, was to be put.

18. The Respondent 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 RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

19. The Respondent is a data controller and data processor within the definitions of the Act and therefore have obligations pursuant to the Act.

20. The Respondent has 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.

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

22. With regards to the duty to notify, the Respondent had an obligation under Section 29 to, before collecting her personal data, inform the Complainant of, among others:

- a) her rights under Section 26 of the Act;
- b) the fact that her personal data was being collected;
- c) the purposes for which her personal data was being collected;
- d) the contacts of the Respondent 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.

23. 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).

24. The conditions of consent are provided under Section 32 of the Act which 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.

25. 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.

26. The Respondent 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.

27. It is noteworthy at this juncture to point out that this Office has received several complaints of this nature against the Respondent and has consequently issued Enforcement Notices with measures to put in place to avoid such complaints. The Respondent seems not to have adhered to these notices issued by this Office.

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 the Respondent liable for violation of the Complainant's rights under the Act, she 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.

30. In view of the foregoing, considering that the Respondent failed to stop sending the Complainant numerous messages regarding a loan she had no knowledge

of despite her informing them of the same, and that the Respondent is a repeat offender with numerous similar complaints lodged with this Office, the Respondent is hereby ordered to compensate the Complainant:

- a. **Kshs. 200,000 (Two Hundred Thousand Shillings Only)** for non-compliance with the principles of data protection in the processing of the Complainant's personal data;
- b. **Kshs. 250,000 (Two Hundred and Fifty Thousand Shillings Only)** for infringement of the Complainant's rights;
- c. **Kshs. 50,000 (Fifty Thousand Shillings Only)** for failing to inform the Complainant of the use of her personal data.

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for infringement of the Complainant's rights and violation of its obligations under the Act;
- ii. The Respondent is hereby ordered to compensate the Complainant **Kshs. 500,000 (Five Hundred Thousand Shillings only)**; and
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 16th day of January, 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

