



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 2120 OF 2023

BRIAN MWALIMU VOLISI.....COMPLAINANT

-VERSUS-

FIN KENYA (FORMERLY TRUSTGRO SCA 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 that the Respondent used the Complainant's employment details to process a loan application 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 18th 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 microfinance company that provides various financial services to its customers.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it vide a letter dated 22nd November 2023 referenced ODPC/CONF/1/5 VOL 1 (572). 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 legal basis relied upon to use the Complainant's employment data to process the loan;
 - d. The application forms used to secure the loan;
 - e. Whether the Complainant was notified and if he consented to the loan application; 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 and received the above stated letter on 28th 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's Mwingi office used his employment details to fill a loan application without his consent. He stated that he tried to reach out to the Respondent to clarify the issue to no avail.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

12. The Complainant stated that he took a loan with the Respondent in 2018 and has since been paying the said loan through monthly deductions of K.shs. 8,360 from his salary.

13. The Complainant alleged that in August 2023, he was contacted by the Respondent to confirm details of a loan he had applied. He informed the Respondent that he did not apply for a second loan but he was aware of the existing loan.

14. In September 2023, he noticed an increase in deduction of his salary from K.shs. 8,360 to in the month of August 2023 to K.shs 11,800 in the month of September 2023 for the second loan that he had allegedly not applied for.

15. The Complainant attached his payslips and emails that he sent to the Respondent to decline the loan application and to request the loan application form for his perusal.

16. The Complainant requested this Office to, among others, make an order for compensation against the Respondent.

ii. THE RESPONDENT'S RESPONSE

17. The Respondent was sent a notification of complaint on 22nd November 2023 but failed to respond to the said notification.

F. ISSUES FOR DETERMINATION

18. 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

19. Section 26(a) and (b) of the Act provides for the rights of a data subject under the Act. As such, the Complainant had the right to be **informed** to the use of

his personal data and to **access** his personal data that was in custody of the Respondent and to object to the processing of all or part of his personal data.

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

21. The Complainant had the right not only to be informed to the use in which his personal data was to be put but also to access the loan application form that was used to apply for the loan which he allegedly did not apply for. The Respondent had these details in its custody and would have clarified the issue on the loan application.

22. Further, the Complainant clearly stated that he did not consent to the new loan and therefore the application should be declined. He was exercising his right to object to the processing of the loan using his personal data that was in the Respondent's custody.

23. The Respondent failed to respond to these allegations and therefore, the allegations remain uncontroverted and therefore an infringement of the Complainant's rights.

24. This Office therefore finds that there was a violation of the Complainant's rights under Section 26 (a),(b) and (c) of the Act.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

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

26. 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 (b) and (c) of the Act to ensure that personal data is processed lawfully, fairly and in a transparent manner in relation to any data subject and not further processed in a manner incompatible with those purposes.

27. The Respondent collected the Complainant's personal data for purposes of processing his first loan. However, it used the same details in its custody to further process the Complainant's personal data to fill an application form for a loan without his consent. This amounts to processing of the Complainant's personal data in a manner incompatible with the purpose for collection of the Complainant's personal data in the first place.
28. 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).
29. 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.
30. The Respondent failed to respond to the allegations raised in the complaint and therefore did not discharge the burden of proof as to whether they had a lawful basis for processing the Complainant's personal data in the second loan application.
31. 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.

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 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.

34. In view of the foregoing, considering that the Respondent caused the Complainant to be deducted a further Kshs. 3,440 based on the second loan that he did not consent to, this Office orders the Respondent to refund the Complainant **Kshs. 3,440 (Three Thousand Four Hundred and Forty shillings only)** as the financial loss incurred by the Complainant, being the total amount deducted from September 2023 salary. Moreover, that is the only amount that the complainant proved by way of payslip despite his claim that the the said amounts are being deducted to date.

35. Further, the Respondent is hereby ordered to compensate the Complainant **Kshs. 750,000 (Seven Hundred and Fifty Thousand Shillings only)**; for infringement of the Complainant's rights under section 25(a),(b) and (c) the Act.

36. The Respondent is also found liable for violation of various Sections of the Act, therefore, an Enforcement Notice shall be issued against it.

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37. The Respondent is directed to avail to the Complainant, his loan statement as at the date of this determination and the loan application form used to apply for the second loan. These documents contain the Complainant's personal details and therefore he should have access to them.

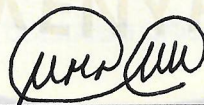
G. FINAL DETERMINATION

38. 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:
 - a) **K.shs. 3,440 (Three Thousand Four Hundred and Forty Shillings Only) being financial loss incurred;**
 - b) **Kshs. 750,000 being compensation for Violation of complainant's rights under section 25 (a),(b) and (c) under the Act (Seven Hundred and Fifty Thousand Shillings only);**

Total: 753,440 (Seven Hundred and Fifty Three Thousand Four Hundred and Forty Shillings Only)
- iii. An Enforcement Notice 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 15th day of January 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER