



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 2134 OF 2023

SHEILA LULU OKONG'O.....COMPLAINANT

-VERSUS-

MOTOWN GROUP 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 19th October 2023 against the Respondent alleging that the Respondent published and used her images without her 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 19th October 2023. The complaint was lodged 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.
7. The Respondent is an entertainment establishment in Langata.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *via* a letter dated 15th November, 2023 referenced **ODPC/CONF/1/5 VOL 1 (559)**. 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 Respondents were 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; and

- 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
9. The Respondent responded to the said notification via a letter dated 22nd November 2023 and, in their response, they requested that the complaint be resolved through mediation pursuant to Section 9 (1) (c) of the Act, Regulation 15 of the Enforcement Regulations and the ADR Guidelines published by this Office.
10. As the ADR process is party based, the Complainant was requested for consent to resolve the dispute through mediation or conciliation. The Complainant agreed to attempt to resolve the dispute through the aforementioned methods of ADR.
11. Despite attempts to resolve the dispute through ADR, the complaint was not resolved and therefore, the dispute was referred back to this Office for determination as per Regulation 15 (8) of the Enforcement Regulations which provides that where the complaint is not determined through ADR, the Data Commissioner shall proceed to determine the complaint as provided for in the Act and the Regulations.
12. This determination is therefore pegged on the provisions of Regulation 14 of the Regulations which states 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

13. The Complainant alleged that the Respondent made a poster advertising various job opportunities in its establishment. The said advertisement poster contained the Complainant's image taken during her admission to the Bar of Advocates.
14. The Complainant alleged that her image was used without her consent hence violating her privacy rights.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

15. The Complainant provided a screenshot of the poster containing her image and messages from various persons inquiring as to whether she was associated with the Respondent.

16. The Complainant also availed a demand letter dated 29th September 2023 sent to the Respondent demanding that they pull down the poster that contained her image.

ii. THE RESPONDENT'S CASE

17. The Respondent confirmed that it was indeed seeking to hire staff.

18. The Respondent however denied being the maker of the poster and its association to them and its authenticity as they alleged that the poster was not processed by their establishment but by a person unknown to them.

19. Furthermore, the Respondent alleged that poster was not posted on any of its social media platforms, instead, it circulated through other mediums or channels that they were unaware of.

20. The Respondent stated that it was committed to upholding and adhering to the provisions of the Act and that to prevent similar incidents as experienced by the Complainant, the Respondent stated that it will establish designated personnel responsible for managing communications with the establishment and will develop a structured reporting mechanism to ensure compliance with the Act and the Regulations.

F. ISSUES FOR DETERMINATION

21. Based on the evidence adduced by both parties, the following issues fall for determination by this Office:

- i. Whether there was an infringement the of Complainant's rights under the Act; and
- ii. 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

22. The Complainant is a data subject within the definition of the Act has rights under Section 26 (a) and (d) of the Act to be informed of the use to which her personal data is to be put and to object to the processing of all or part of their personal data.

23. However, the Complainant did not avail proof that indeed it was the Respondent that published the poster using her image. She was informed of the poster by persons known to her that the poster containing her image was circulating in various Whatsapp groups.

24. The messages that she received regarding the poster were defamatory to her image as an Advocate of the High Court of Kenya. This Office has no jurisdiction to deal with defamation matters as it does not fall under the ambit of the Act. The Complainant is therefore directed to seek redress from the appropriate forum.

25. The Office therefore finds that the Complainant's rights under the Act were not violated.

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

26. 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.

27. Having found that the Complainant did not prove her case in whether it was the Respondent who published the poster containing her image, the complaint is dismissed for lack of merit.

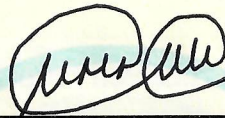
NA

G. FINAL DETERMINATION

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

- i. The Respondent did not infringe on the Complainant's rights under the Act;
- ii. The complaint is dismissed for lack of merit; and
- iii. 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**