



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 2187 OF 2023

NICKSON MUDII.....COMPLAINANT

-VERSUS-

ARROW FACILITIES LTD.....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. This Complaint is in respect of the Complainant's claim that his image was taken and published on a company's website without his consent on or about 3rd August 2019.

B. LEGAL BASIS

2. Article 31 (c) and (d) of the Constitution of Kenya 2010 provides for the right to privacy. Consequently, as an effort 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 of the Data Protection Commissioner (hereinafter '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 OF THE COMPLAINT

5. The Office received a complaint by Nickson Mudii (hereinafter 'the Complainant') on 25th October 2023 pursuant to Section 56 of the Act and Regulation 14 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. Arrow Facilities Ltd (hereinafter the 'Respondent') is a cleaning services company.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 7th November, 2023, and required its response within 14 days.
8. The Respondent responded to the notification of the complaint letter *vide* a letter dated 28th November 2023.
9. This determination is therefore as 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

10. The Complainant stated that he worked with Arrow Facilities Management as team supervisor from the 15th day of May 2019 upto around 28th day of May 2020 after which he left the Company on his own volition.

11. He stated that whilst conducting his duties sometime in 2020, he was photographed without his express consent and was surprised to see his image published on the Respondent's official website for commercial gain. Without any form of sufficient compensation whatsoever.
12. He averred that on the 15th day of April 2022, he was browsing the internet using his mobile phone and coincidentally came across the website of the Respondent which was advertising its cleaning services **as the best cleaning company in Kenya; are you looking to outsource your cleaning task and are wondering which is the best cleaning services in Nairobi, Kenya how it works.... Taking the stress out of any aspect of cleaning is what we specialize in.... we will come to your premises and offer a free quote, so you know exactly you will be spending.... book online.... give us a few details about the type of cleaning you need.**
13. That upon browsing the internet he found his images that constitute personal data i.e. appearance and personal attribute on the Respondent's website. The said images were;
- a) Photographed and printed and posted on the Respondent's website arrowfltd.com without my consent
 - b) Being used for commercial purposes i.e. advertising the cleaning services of the company offers which include cleaning of offices, cleaning of carpets, and cleaning of houses.
 - c) No compensation was paid for the use of my images for commercial gain.

II. RESPONDENT'S RESPONSE

14. The Respondent, on 28th November, 2023 responded to the allegations against it.
15. The Respondent stated that it engaged the Complainant as a team supervisor for 3 months from 1st August 2019 until 31st October 2019, upon expiry of which, the employment relationship was mutually terminated.

16. On 3rd August 2019 at 9.00 am, the Respondent held a debrief with various employees (including the Complainant), informing them of their participation in a shoot as part of their ordinary course of duties. The employees were informed that photographs were to be taken of the employees and used for marketing purposes, which was agreed upon by all employees present in the meeting. The photographs of various employees including the Complainant, were then taken the same day. At the photo shoot, the Complainant supervised, organized, and coordinated his team in the process of taking the photographs on that day and was fully aware that the photographs were being taken for marketing purposes as he is seen posing in every photo.
17. The Respondent further states that the Complainant was fully aware that all photographs being taken on the material day were intended to be used for marketing purposes including for display on the Respondent's website.
18. Upon the Complainant's exit, on 15th April 2022, the Respondent received a demand notice from the Complainant demanding, inter alia, that the Respondent pull down all images portraying the Complainant from its website. This request was complied with and the images were pulled down from the Respondent's website.
19. The Respondent further averred that it has since taken active measures towards the compliance of the DPA. It has engaged with the legal and data privacy experts who are currently working on ensuring compliance with the DPA and accompanying regulations, including a review of documentation such as employment contracts and human resources manuals to include data privacy provisions therein. Our client also has a strict policy of complying with data erasure requests, unless allowed otherwise within the law, as can be seen in the present case.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

20. As part of his evidence the Complainant adduced the following:

- a. The Respondent's brochure;
- b. Copy of his passport-size photographs;
- c. Respondent's advocate's letter dated 22nd April 2022.

II. THE RESPONDENT'S EVIDENCE

21. As part of its evidence the Respondent produced the following:-

- a) Respondent's Board Resolution dated 27/11/2023
- b) A copy of the Respondent's official company search;
- c) Affidavit of the Respondent Company co-founder
- d) All the photos taken on 3rd August 2019 and the metadata of the impugned photographs.

F. ISSUES FOR DETERMINATION

- i. Whether this Office has the mandate to determine the Complaint.
- ii. Whether the Complainant is entitled to any remedy under the Act.

G. ANALYSIS AND DETERMINATION

I. WHETHER THIS OFFICE HAS THE MANDATE TO DETERMINE THE COMPLAINT.

22. The mandate of this Office envisaged under the Data Protection Act, 2019 is as set out hereinbefore. This mandate was bestowed upon this Office upon the enactment of the Data Protection Act, No. 24 of 2019 whose commencement date was 25th November 2019.

23. 25th November 2019 will remain a historic date in Kenya as the Country's first-ever data protection law came into force, giving effect to Article 31 (c) and (d) of the Constitution.

24. From the documents adduced to this Office, it is evident that the complaint filed herein relates to events that occurred on 3rd August 2019 when the Complainant had been employed by the Respondent under a temporary contract of employment. It is uncontroverted that the purported transgressions occurred on 3rd August 2019 wherein during a photoshoot the Respondent took a photo of the Complainant and placed it on its website. This was before the Data Protection Act No. 24 of 2019 became operational.
25. The Data Protection Act establishing this Office and giving it mandate to determine complaints relating to Article 31(c) and (d) of the Constitution became operational on 25th November, 2019 after the purported incident had occurred.
26. It is trite law that laws do not operate retrogressively but progressively, subject to established exceptions. The Complainant lodging his complaint and inviting this Office to investigate and determine matters which occurred before the enactment of the Act is akin to inviting this Office to apply the law retrogressively. This Office will not trod into such murky waters.
27. As such, this Office has no mandate and/or authority over acts that occurred before the enactment of the Data Protection Act, 2019, that is, before 25th November 2019.
28. We further note that upon exercising his rights of objection to the use of his image, the Respondent pulled it down from its website.

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

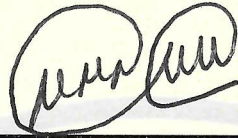
29. Having determined that this Office has no authority, mandate, and power to interrogate the actions complained by the Complainant because the same occurred before the enactment of the Act, it therefore follows that this Office has no powers to consider and grant the remedies sought by the Complainant.

H. FINAL DETERMINATION

30. The Data Commissioner therefore makes the following final determination;
- i. The Complaint is hereby dismissed.

ii. Parties have the right to appeal this determination.

DATED at **NAIROBI** this 22nd day of January 2024



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

