



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 2431 OF 2023

MARK ROSS..... COMPLAINANT

-VERSUS-

GRAEME THOMPSON.....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 the Respondent installed CCTV cameras in his premises in a manner that collects and monitors movements in and out of the Complainant's residence thus infringing on the Complainant's rights as provided in Section 26 of the Data Protection Act, 2019.

B. LEGAL BASIS

2. Article 31 (c) and (d) of the Constitution of Kenya 2010 provides for the right to privacy. Consequently, 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 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

5. The Office received a complaint dated 22nd November, 2023 by Mark C. Ross (hereinafter 'the Complainant') filed on his behalf by his Advocates on record 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.
6. Pursuant to Regulation 11 of the Enforcement Regulations, this Office notified the Respondent of the complaint filed against him *vide* a letter dated 30th November, 2023 referenced ODPC/CONF/1/5 VOL 1 (607) and required his response within 21 days. The Office sought the following from the Respondent;
 - (a) A response to the allegations made against the Respondent by the Complainant.
 - (b) Provision of any relevant materials or evidence in support of the response above;
 - (c) The mitigation measures 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;
 - (d) Provision of the retention period and location of the images/videos captured by the CCTV cameras.

- (e) The legal basis relied upon to process and engage with the complainant's personal data and whether or how they fulfil the duty to notify under section 29 of the Act.
- (f) Any other information that they wish the office to consider in reaching its findings.
7. The Respondent, through their Advocates, responded to the notification of the complaint letter *vide* a letter dated 21st December 2023 and received by this Office on the same date.
8. This determination is therefore 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

9. It is the Complainant's case that both the Complainant and the Respondent are residents of Ndege Gardens situated on Ndege Road in Karen, Nairobi. Both the Complainant and the Respondent occupy their respective houses.
10. The Complainant states that the Respondent installed CCTV Cameras on either side of the entrance to his house which cameras point to the opposite direction of the road within the estate. He further states that the cameras monitor movements on the said road including anyone walking or driving to the Complainant's house.
11. According to the Complainant, the installation of the said CCTV clearly violates the Complainant's right to privacy, movement and residency as set out in Articles 28, 31 and 39 of the Constitution.
12. The Complainant avers that he is apprehensive on the intention of the use of the images and recordings of the CCTV in the control of the Respondent and that the same is in violation of his data in contravention of Article 31 of the Constitution and Sections 25 and 26 of the Data Protection Act, No. 24 of 2019.
13. The Complainant further states that the installation of CCTV outside one's premises and within a private residential estate violates the security provisions of

the Private Security Regulations Act, No. 13 of 2016, the Penal Code and the Trespass Act Cap. 294. These regulatory provisions fall outside the mandate of this Office and will thus not be considered.

14. The Complainant sought this Office's intervention in having the Respondent subjected to the punitive provisions of the Act, including penalties for violation and non-compliance with the Act.

II. RESPONDENT'S CASE

15. As stated above, the Respondent, through their Advocates on record responded to the allegations against it on 21st December 2023.

16. In their response, the Respondent stated that:

- (i) The Respondent denies the allegations that he has installed CCTV Cameras on either side of his entrance/exit gate of his house/residence which point to or face the opposite directions of the road on the frontage of his gate and the Complainant's gate such that they monitor movements on the said road specifically or including anyone walking or driving into the Complainant's residence.
- (ii) The Respondent wishes to clarify that the 2 CCTV camera installations at his entrance gate point directly to Ndege Road and only collect data of persons and movement into and out of the Respondent's residence and movements directly along and across the frontage of Ndege Road such that it cannot collect any data relating to movements into or out of the Complainant's residence, the road into the Complainant's resident, in front of his gate or the neighbour on the other side of the Respondent's residence and that the cameras do not point to either side or opposite side of the Road or either side of the entrance to the Complainant's house as alleged or at all. The 2 CCTV cameras at the gate only show the entry to the Respondent's house and do not point or show the road into or the residence to the Complainant's house.
- (iii) The allegations that the Respondent has installed cameras monitoring movements into and out of the Complainant's residence are not only denied

and misrepresentation of material facts by the Complainant but also vexatious harassment and otherwise an abuse of legal process by the Complainant to vex and settle personal scores against the Respondent and that the allegations are not true.

- (iv) The Respondent therefore denies collecting any data in respect to movements in and out of the Complainant's residence or breach of the Data Protection Act, Penal Code or any other laws of Kenya as alleged in the Complaint or at all.
- (v) Further that the Respondent's CCTV Camera images are stored for 7 days and deleted, although the same do not compromise personal data or collection of information relating to the alleged Complaint herein. That investigating officers visited the Respondent's premises on 30/11/2023 while serving a letter dated 30/11/2023 when they were allowed access and monitor to the Respondent's CCTV stored data stored within the Respondent's house for the last 7 days with effect from the above date and verified that the data did not comprise of movements or images of the frontage of the Complainants entrance or gate as alleged or at all.
- (vi) It is the Respondent's position that the Complainant's apprehensions are based on misconception of material facts which would otherwise have been verified and clarified to the Complainant if he simply visited the Respondent and viewed the CCTV Camera's placement and data collected. Instead of undertaking the above process in the spirit of good neighbourliness, the Complainant has chosen to lodge complaints against the Respondent based on false information and misrepresentation of material facts with intent to achieve ulterior purposes other than proper use of the legal process and resources.
- (vii) The Respondent noted that there has been an ongoing dispute between him and the Complainant who alleges that the Respondent's licensed dogs are noisy. The dispute is unrelated to Data Protection law or privacy. They are instructed that the Complainant has been coming to the Respondent's

fence bordering his house and abusing and shouting at the dogs provoking and inciting them to engage him more and this harassment was reported to Karen Police Station by the Respondent and the same is under investigation by the said Police Station. It is the above dispute that must have fueled the Complainant's malicious false complaint herein as the Complainant has not been able to intimidate and harass the Respondent to remove the said dogs from the Respondent's residence because they are licensed under City County by laws and the residence association by laws permit keeping of dogs provided they do not trespass to other people's property.

E. INVESTIGATIONS CONDUCTED

17. As part of the investigation, the Office conducted an impromptu site visit at the subject premises on 30th November 2023. The investigating officers were granted access by the Respondent to review the CCTV cameras in real time as well as the stored data. The investigators observed the two subject CCTV camera installations at the Respondent's entrance gate and took photographs of the subject cameras as well as screenshots of the real time views captured on the CCTV cameras.

F. ISSUES FOR DETERMINATION

18. Having considered the nature of the complaint, the evidence adduced by all parties to the complaint, and the investigations conducted by this Office, the issues for determination that arise are:-

- i. Whether the CCTV cameras were processing personal data;
- ii. Whether the processing of personal data by the CCTV cameras is exempt from the provisions of the Act; and
- iii. Whether the Complainant is entitled to any remedy under the Act.

G. ANALYSIS AND DETERMINATION

I. WHETHER THE CCTV CAMERAS WERE PROCESSING PERSONAL DATA.

19. The Complainant alleges that the CCTV cameras installed by the Respondent collect personal data of persons coming into and out of the Complainant's residence.

20. For the complaint to fall within the ambit of the Act and the jurisdiction of this Office, it is imperative to consider the object and purpose of the Act. Section 3 of the Act provides that the object and purpose of the Act is –

(a) to regulate the processing of personal data;

(b) to ensure that the processing of personal data of a data subject is guided by the principles set out in section 25;

(c) to protect the privacy of individuals;

(d) to establish the legal and institutional mechanism to protect personal data; and

(e) to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with this Act.

21. Section 4 sets out the application of the Act to include the processing of personal data entered into a record by or for a data controller or processor, by making use of automated or non automated means, provided that when the recorded personal data is processed by non-automated means, it forms a whole or part of a filing system.

22. The question that then arises is whether the CCTV cameras process any personal data and whether the personal data is entered into a record by a data controller or data processor by making use of automated means.

23. 'Personal data' is defined in Section 2 of the Act as any information relating to an identified or identifiable natural person. An identified person being one who can be identified directly or indirectly in reference to one or more factors specific to their physical identity. Accordingly, the image of a person recorded by a camera system constitutes personal data, in as much as its possible to identify the person.

24. As to whether there is processing of the said personal data, the Office finds that there are operations and/or sets of operations that are performed on the personal data captured by the CCTV cameras by automated means in the collection, transmission and retention of the images in the stored media and as live footage.

25. The Office therefore finds that the CCTV cameras were processing personal data.

II. WHETHER THE PROCESSING OF PERSONAL DATA BY THE CCTV CAMERAS IS EXEMPT FROM THE PROVISIONS OF THE ACT.

26. Having established that personal data is in fact processed by the CCTV cameras, the Office will then consider whether the said processing is exempt from the provisions of the Act.

27. Section 51 of the Act sets out the General Exemptions to the Act. Section 51(2) thereof provides that processing of personal data by an individual in the course of a purely personal or household activity is exempt from the provisions of the Act.

28. For this exemption to apply, the processing must be –

- ✓ undertaken by 'an individual'; and
- ✓ undertaken in the course of a purely personal or household activity.

29. The first threshold is undisputed as the Respondent is an 'individual' natural person. The Office shall therefore consider the second threshold, that is, whether the processing is undertaken in the course of a purely personal or household.

30. The Act does not provide a specific definition of 'personal' and 'household' activities. In considering an equivalent provision under the European Union Data Protection Directive 95/46, the Court of Justice of the European Union (CJEU) in *C-25/17 Jehovan todistajat* held that a processing activity cannot be regarded as purely personal or domestic where –

- a) its purpose is to make the data collected accessible to an unrestricted number of people or

b) where that activity extends, even partially, to a public space and is accordingly directed outwards from the private setting of the person who is processing the data.

31. Persuasive to this Complaint is the second consideration, as to whether the CCTV cameras were collecting personal data from outside the private setting of the Respondent's premises. This requires this Office to examine the processing undertaken by the CCTV cameras and whether the same extended to a public space outside the Respondent's premises or directed outwards from the Respondent's private setting.

32. Where the CCTV camera processes personal data outside the individual's property boundary, the individual would be required to ensure compliance with the Act. This includes establishing the lawfulness of processing, compliance with the requirements of the Act and providing mechanisms for enabling the rights of data subjects regarding the processing.

33. As stated hereinbefore, the Office conducted an impromptu site visit at the Respondent's residence on 30th November, 2023. They were allowed access to review CCTV stored data by the occupants of the Respondent's premises without any resistance. The Office was also able to observe the CCTV cameras in real time.

34. The investigations determined that the two CCTV camera installations at the Respondent's entrance gate point directly to each other and only collect data of persons and movement into and out of the Respondent's residence. The Respondent's CCTV Cameras were installed in a fixed position and did not point towards the Complainant's residence nor were they monitoring movements into and out of the Complainant's residence.

35. The Office therefore finds that the use of CCTV by the Respondent to capture video and sound recording within his premises encompassed processing of personal data in the course of a purely personal or household activity which is exempt from the provisions of the Act.

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

36. Pursuant to Regulation 14 (2) of the Enforcement Regulations, a determination shall state the remedy to which the complainant is entitled. The remedies are provided for in Regulation 14 (3) of the Enforcement Regulations.

37. The Office has considered the merits of the complaint, the evidence adduced by both the Complainant and the Respondent and the investigations conducted by the Office.

38. This Office has found that the use of CCTV by the Respondent to capture video and sound recording within his premises encompassed processing of personal data in the course of a purely personal or household activity and is exempt from the provisions of the Act.

39. It therefore follows that the Complainant is not entitled to any remedy under the Act.

H. FINAL DETERMINATION

40. In the ultimate, the Data Commissioner therefore makes the following final determination:

- i. The complaint is hereby dismissed.
- ii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 24th day of January **2024**



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER