



**OFFICE OF THE DATA PROTECTION COMMISSIONER**  
**ODPC COMPLAINT NO. 0570 OF 2023**

**VISHAAL SHAH.....1<sup>ST</sup> COMPLAINANT**  
**KEVAL SHAH.....2<sup>ND</sup> COMPLAINANT**  
**ROSNI SHAH.....3<sup>RD</sup> COMPLAINANT**  
**SHRIKUNJ SHAH.....4<sup>TH</sup> COMPLAINANT**  
**MADHUP DOKANIA.....5<sup>TH</sup> COMPLAINANT**

**-VERSUS-**

**CYPRIAN NYAKUNDI.....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 Constitution of Kenya 2010, under Article 31 recognizes the right to privacy. Consequently, in an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter "the Act") was enacted. Section 8 (1)(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.

2. The Office of the Data Protection Commissioner (hereinafter as "the Office") is a regulatory Office, established pursuant to the Data Protection Act, 2019. The Office 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.
3. On 14<sup>th</sup> April, 2023 the Office received four (4) complaints from the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Complainants and on 15<sup>th</sup> April, 2023 received one (1) complaint from the 5<sup>th</sup> Complainant, all against Cyprian Nyakundi (hereinafter the "Respondent").
4. On 14<sup>th</sup> June 2023, the Office in the exercise of its mandate as envisaged under the Act and in the promotion of justice, notified the Respondent of the complaints filed against him via a letter dated 13<sup>th</sup> June 2023, which was served upon the Respondent on 14<sup>th</sup> June, 2023. In the notification of the complaints filed against the Respondent, the Respondent was to provide: -
  - (a) A response to the allegations made against him by the Complainants;
  - (b) Details of how he obtained the Complainants' personal data and whether the Complainants consented to their personal data being posted on his website;
  - (c) The legal basis under which he relied on to publish the Complainants' personal data on his website;
  - (d) The mitigation measures adopted or being adopted to address the complaints to the satisfaction of the Complainants;
  - (e) The Respondent's data protection policy outlining the complaints handling mechanism to deal with matters relating to the rights of a data subject under the Act, the Regulations and any alleged contravention directed to his attention by data subjects;
  - (f) Demonstration (by way of written statement) of his level of compliance with the requirements under the Act and the Regulations. In particular, an



elaborate representation of how data subjects can exercise their rights in relation to data protection; and

- (g) The technical and organizational safeguards that have been put in place to ensure that such occurrences mentioned in the complaints do occur again.
5. This determination is pegged on the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 which states that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

### **B. NATURE OF THE COMPLAINTS**

6. All the complaints against the Respondent relate to the alleged publishing of the Complainants' names and mobile phone numbers by the Respondent on his website <https://cnyakundi.com>, through the link <https://cnyakundi.com/vishaal-shashikant-shah-dubai-and-kenyas-own-mini-version-of-bernie-madoff/> without the consent of the Complainants.

### **C. THE RESPONDENT'S RESPONSE TO THE COMPLAINT**

7. The On 14<sup>th</sup> June 2023, the Respondent via email, responded to our notification of complaints letter and stated verbatim, "You guys are too idle."
8. Further, on 20<sup>th</sup> June 2023, the Respondent on his verified twitter account **(Cyprian, Is Nyakundi - @C\_NyaKundiH)** and through the link [https://twitter.com/C\\_NyaKundiH/status/1671202629026820120?t=CrNIIOxGJ3oTOiU53xRmKA&s=08](https://twitter.com/C_NyaKundiH/status/1671202629026820120?t=CrNIIOxGJ3oTOiU53xRmKA&s=08) posted a copy of the notification of complaints letter sent to him by the Office accompanied by the caption, "Looks like some corrupt guy reported me to the office of the data protection commissioner idlers. This office has started collecting money promising guys they'll save them from bloggers. If you have an issue, go to court. Hizi zingine ni porojo!"

## **D. ISSUES FOR DETERMINATION**

- i. Whether the Respondent published the Complainants' personal data on his website without consent from the Complainants.
- ii. Whether the said publication falls under the exemptions in the Data Protection Act.

## **E. ANALYSIS AND DETERMINATION**

### **I. WHETHER THE RESPONDENT PUBLISHED THE COMPLAINANTS' PERSONAL DATA ON HIS WEBSITE WITHOUT CONSENT FROM THE COMPLAINANTS**

9. It is alleged that the Respondent published the names and mobile phone numbers of the Complainants on his website <https://cnyakundi.com> without seeking prior consent from the Complainants. The Complainants provided the link and the Office was able to establish that indeed the Complainants' names and mobile phone numbers were published there.
10. On the issue of whether prior consent was obtained by the Respondent before publishing the names and phone numbers of the Complainants on his website, the Respondent did not address this issue in his response and therefore the Complainants' allegations remain uncontroverted. This office therefore finds that no prior consent was sought by the Respondent from the Complainants before publishing their names and mobile phone numbers on his website.

### **II. WHETHER THE SAID PUBLICATION FALLS UNDER THE EXEMPTIONS IN THE DATA PROTECTION ACT**

11. This office is guided part VII of the DPA that provides for the exemptions. Section 52 provides for the exemptions in relation to **Journalism, literature and art**, the principles of processing personal data shall not apply where:



***"a) Processing is undertaken by a person for the publication of a literary or artistic material;***

***b) Data controller reasonably believes that publication would be in the public interest; and***

***c) Data controller reasonably believes that, in all the circumstances, compliance with the provision is incompatible with the special purposes***

***Subsection (1)(b) shall only apply where it can be demonstrated that the processing is in compliance with any self-regulatory or issued code of ethics in practice and relevant to the publication in question"***

11. Section 2 of the Copyright Act defines "literary work" means, irrespective of literary quality, any of the following, or works similar thereto— ***(a) novels, stories and poetic works; (b) plays, stage directions, film sceneries and broadcasting scripts; (c) textbooks, treatises, histories, biographies, essays and articles; (d) encyclopaedias and dictionaries; (e) letters, reports and memoranda; (f) lectures, addresses and sermons; (g) charts and tables; (h) computer programs; and (i) tables and compilations of data including tables and compilations of data stored and embodied in a computer or a medium used in conjunction with a computer.*** The Respondent's website falls under this cadre.

12. Section 52(1)(b) provides that in such instances the Data controller has to reasonably believe that publication would be in the public interest. It was pronounced in **Kenya Anti-Corruption Commission vs. Deepak Chamanlal Kamni and 4 others, [2014] eKLR** what public interest is: ***"...a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large."***

13. Consequently, the Respondent's publication and the processing of the said data was done in view of public interest. With regards to whether the Respondent is a journalist the Media Act, 2013 defines a journalist as ***"any person who is***

***recognized as such by the Council upon fulfilment of a criteria set by the Council."***

14. Upon further investigation with The Media Council of Kenya, it was established that the Respondent is not an accredited journalist as he did not appear on their accreditation portal. Similarly, this office contacted the Bloggers Association of Kenya (BAKE) with a view to establish whether the Respondent was a member which was not the case.
15. The office further takes cognizance of the fact that the Respondent is not a journalist and therefore not bound by the provisions of Media Act and attendant Code of Ethics under the second schedule.
16. It is also not lost to this office that the complaint raises questions on matters pertaining anonymity, and gross white collar crime allegations that elicit national and public interest, alike. The latter issues subsequently call for further, and specialized investigations to unravel the veracity, if any, of the leveled allegations.

#### **F. FINAL DETERMINATION**

17. The Data Commissioner, therefore, makes the following final determination;
- i. The complaint is hereby referred to Directorate of Criminal Investigations for further investigations, in line with section 59 of the Data Protection Act, No. 24 of 2019.
  - ii. Parties have the right to appeal this determination to the High Court of Kenya.

**DATED** at **NAIROBI** this 12<sup>th</sup> day of July 2023.



**IMMACULATE KASSAIT, MBS  
DATA COMMISSIONER**