



OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 0607 OF 2023

PERPETUAL WANJIKU.....COMPLAINANT

-VERSUS-

CASA VERA LOUNGE.....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 (c) and (d) 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.
2. Section 8 (f) of the Act provides that the Office of the Data Protection Commissioner (hereinafter known as 'the Office') can receive and investigate any complaint by any person on infringements of the rights under the Act. Furthermore, Section 56 (1) 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.
3. 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

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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. It is on that basis that, the Office received a complaint dated 14th April, 2023 pursuant to Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 ('the Regulations') from the Complainant who was an aggrieved data subject.
5. The Respondent is an entertainment joint in Nairobi while the Complainant was their customer.
6. Pursuant to Regulation 11 of the Regulations, the Office, notified the Respondent of the complaints filed against them vide a letter dated 9th June, 2023 referenced ODPC/CONF/1/5 VOL 1 (289) and required their response within 21 days. Upon receipt of the responses, the Office conducted investigations as required by Regulation 13 (1)(d) of the Regulations.
7. 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.

B. NATURE OF THE COMPLAINT

8. The Complainant a customer at the Respondent's premises when her image was captured and featured on the Respondent's social media pages.
9. The Complainant's image was allegedly doing rounds on social media platforms precisely on Instagram and Facebook and had also been shared widely on Whatsapp vide the following links:
<https://www.instagram.com/p/CiCE5RtISi6/?igshid=MDJmNzVkMjY=> and
https://m.facebook.com/story.php?story_fbid=pfbid0GSDBCTKnQleZK89bALKSaG8Bm5WxHeEGaxcHXyDHTsjJwp9MmiuF1cSufMC9bRgel&id=100083287655173 under the caption **"About last night with pskratch kenya&@giftthesimpleg."**

10. The Complainant did not authorise the Respondent to use her image and was not and never been the ambassador of the Respondent.

C. ANALYSIS OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

11. The Complainant filled the complaint's form and stated that the Respondent had no right to publish her image and that it was a breach of her privacy. She was concerned by the commercial use of her photo for advertisement of the entertainment joint and was further aggrieved by invasion of privacy.
12. The Complainant alleged that no written apology emanated from the Respondent despite demand of the same. She attached a demand letter dated 16th October 2022 referenced PN/LIT/2022. However, the Office notes that the letter does not bear a receipt stamp to indicate that the Respondent actually received the letter and neglected to act on it as the same was served vide email.
13. The Complainant attached a supporting affidavit to her complaint containing the same details as indicated in the complaint form. She attached a copy of the demand letter allegedly sent to the Respondent, a copy of her Identity Card and another image to confirm her likeness.
14. Preliminary investigations conducted by this Office demonstrated that the image on the Respondent's Instagram page and the image provided by the Complainant are a match and it was indeed the Complainant's image on the said social media pages.
15. The Complainant sought the following remedies from this Office for the alleged breach:
- i. A declaration that the Respondent's actions amounted to breach of the Complainant's right to privacy under Article 31 of the Constitution;
 - ii. An order for compensation to the data subject by the Respondent;
 - iii. Recommendation for prosecution;

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- iv. Issuance of an enforcement notice to the Respondent in accordance with the Act and the Regulations.
16. The Complainant prayed for Kshs. 5,000,000 or any other amount of compensation as will be determined by the Data Commissioner considering the number of forums she was exposed, the lack of remorse, the commercial exploitation of her image and the mental anguish.
17. The Complainant based her remedies on several authorities as precedent of similar cases:
- i. ***M W K v another vs. Attorney General & 3 others*** (2017) eKLR where the court awarded a global sum of Kshs. 4,000,000 for breach of privacy;
 - ii. ***Ann Njoki Kumena vs. KTDA Agency Ltd*** (2019) eKLR where the court, having considered the purpose to which the photograph was used awarded the plaintiff Kshs. 1,500,000.
 - iii. ***Mutuku Ndambuki Matingi vs. Rafiki Microfinance Bank Limited*** (2021) eKLR the court granted the sum of Kshs. 2,000,000 as damages for violation of the Petitioner's right to dignity and privacy.
 - iv. ***David Gicheru v Gicheha Farms Limited & another*** (2020) eKLR where the court awarded the petitioner Kshs. 1,500,000 as compensation.

II. THE RESPONDENT'S EVIDENCE

18. The Respondent provided a response to the Notification of Complaint vide a letter dated 9th July, 2023.
19. In the said letter, the Respondent stated that it is committed to safeguard its clients' privacy and therefore has put in place a privacy notice conspicuously displayed on a huge board at the entrance of the Respondent's premises. An image of the said notice was provided which stated:

"Disclaimer

BY ENTERING THIS PREMISE, YOU WAIVE AND RELEASE ANY CLAIMS YOU MAY HAVE RELATED TO THE USE OF RECORDED MEDIA OF YOU AT THE EVENT, INCLUDING, WITHOUT LIMITATION, ANY RIGHT TO INSPECT OR APPROVE THE PHOTO, VIDEO OR AUDIO RECORDING OF YOU. ANY CLAIMS FOR INVASION OF PRIVACY, VIOLATION OF THE RIGHT OF PUBLICITY, DEFAMATION, AND COPYRIGHT INFRINGEMENT OR FOR ANY FEES FOR USE OF SUCH RECORDED MEDIA."

20. The Respondent stated that the notice contains, in unambiguous form, a comprehensive statement to the effect that once within the club, the Respondent may take photographs of its customers which may be posted on its social media pages.
21. The Respondents claimed that their photographers never take photographs of their customers without first informing the customer. Therefore, as required under Regulation 4 of the Data Protection (General) Regulations, 2021, the Respondent always seeks consent and informs its customers before taking their photographs that would be accessible to third parties since the images are posted on their social media platforms.
22. The Respondent further claimed that it informs its customers that the photographs would only remain on their social media pages subject to the customer's consent. Where the customer withdraws consent, the Respondent retracts the said photographs from its platforms.
23. According to the Respondent, the Complainant checked into the Respondent's premises on the material day in company of her friends. Their photographer, Clifford Oywa walked to their table and requested to take a photograph of the Complainant and her friend which they did by posing for the same.
24. In an affidavit sworn on 10th July 2023 attached to the Respondent's letter, the photographer stated that he informed the Complainant that her photograph would be posted on the Respondent's social media pages and the Complainant

did not express any reservations to her image being posted on the Respondent's social media pages.

25. The following day, the Respondent claims that the Complainant informed them that she was uncomfortable with her photograph being on its social media pages. The Respondent pulled down the said image and informed the Complainant.
26. Citing Section 32(3) of the Act, the Respondent stated that the retraction of the images upon withdrawal of consent by the complainant did not affect the lawful processing of the said data based on the prior consent given by the Complainant when her photograph was being posted.
27. The Respondent also cited Section 32(4) of the Act which provides that in determining whether consent was freely given, an account shall be taken of whether, among others, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.
28. The Respondent indicated that they complied with Section 37 (1) (a) of the Act by seeking the Complainant's consent before processing her personal data by posting on its social media pages.
29. The Respondent stated that it is in the process of developing a comprehensive internal data privacy policy to further sensitize its employees on data protection with a view to ensure that cases of such breaches do not occur within its premises.
30. The Respondent prayed that the complaint be dismissed.

D. ISSUES FOR DETERMINATION

31. Having considered the nature of the complaint, and the evidence adduced by all parties to the complaint, the following are the issues for determination of this complaint:

- i. Whether the Respondent fulfilled the duty to notify under Section 29 (b) and (c) of the Act; and
- ii. Whether the Respondent satisfied the conditions of consent under the Act and the Regulations;
- iii. Whether the Complainant is entitled to the remedies sought for the alleged breach.

I. WHETHER THE RESPONDENT FULFILLED THE DUTY TO NOTIFY UNDER SECTION 29 (B) AND (C) OF THE ACT

32. Section 29 (b) and (c) indicates that a data controller or data processor shall, before collecting personal data, in so far as practicable, inform the data subject of the fact that personal data is being collected and the purpose for which the personal data is being collected.
33. The Complainant stated that the Respondent captured her image and shared on its social media pages without informing her. On the other hand, the Respondent indicated that they have a conspicuous notice that notified their clients that their image may be captured and they waive the right of any claims of invasion of privacy.
34. This Office conducted a site visit and ascertained that indeed the notice there, however not quite visible to customers upon entry of the Respondent's premises. It is placed at the back of food selling vendors and one can barely recognize that the notice is there.
35. Therefore, this privacy notice is not considered as sufficient notice as envisaged in the Act and the Regulations. Consequently, the said notice does not contain the legal basis for processing of data, how the data will be used, security of the data, how long the data will be kept and the rights of the data subject in relation to the data collected.
36. It is upon this premise that this Office holds that the Respondent failed to sufficiently notify the Complainant that there is a possibility of her image being captured and the use of her image.

37. Therefore, the duty to notify was not fulfilled by the Respondent.

II. WHETHER THE RESPONDENT SATISFIED THE CONDITIONS OF CONSENT UNDER THE ACT AND THE REGULATIONS

38. Obtaining express consent from a data subject is one of the most integral rights that a data subject has under the Act and the Regulations thereof.

39. The conditions of consent are provided for under Section 32 of the Act where subsection (1) places the burden of proof is upon the data controller and data processor to prove that they obtained the data subject's consent to the process of their personal data for a specified purpose.

40. Further, Regulation 4 of the Data Protection (General) Regulations, 2021, (General Regulations) provide for the processing of personal data on the basis of the consent in accordance with Section 32 of the Act. The data controller or data processor is mandated to, in seeking **consent** prior to the processing, inform the data subject of, among others:

- i. **The purpose of each of the processing operations for which consent is sought;**
- ii. **The type of personal data that is collected and used;**
- iii. **The right to withdraw consent; and**
- iv. **The implications of providing, withholding or withdrawing consent.**

41. Sub-regulation 3 provides that in obtaining consent from a data subject, a data controller or a data processor **shall** ensure that the data subject **voluntarily** gives consent and **consent is specific to the purpose of processing**.

42. Regulation 4(4) stipulates that consent shall be considered to have been given freely, unless **where it is presented as a non-negotiable part of the terms and conditions for processing**.

43. The Respondent claimed that, by mounting a privacy notice conspicuously on their premises satisfied the conditions of consent as stipulated under the Act and the Regulations. The Respondent's privacy notice contains non-negotiable terms for processing of their clients' data. It stipulated that they "***waive and release any claims related to the use of their recorded media, any claims for invasion of privacy***". This is contrary to the provisions of both article 31 of the Constitution and the Act and the Regulations on seeking consent as explained above.

44. The affidavit of the Respondent's photographer indicating that he informed the Complainant that her photograph would be posted on their social media pages and that the Complainant did not express any reservations was not enough proof to satisfy the conditions of consent underpinned in the Act and the Regulations.

45. The Complainant's right to consent for her photograph to be taken and published on the Respondent's social media pages was not sought and the Respondent did not satisfy the conditions of consent stipulated under the Act and the Regulations.

III. WHETHER THE COMPLAINANT IS ENTITLED TO THE REMEDIES SOUGHT FOR THE ALLEGED BREACH

46. The right to privacy has been defined in article 31 (c) and (d) of the constitution as every person having the right to privacy which includes the right not to have:

c) information relating to their family or private affairs unnecessarily required or revealed; or

d) the privacy of their communications infringed.

47. Section 3(c) of the DPA provides that one of the objects of the Act is to protect the privacy of individuals and the same is under the purview of this office. Consequently, privacy was also defined by the High Court in ***Jessicar Clarise Wanjiru –vs- Davinci Aesthetics & Reconstruction Centre &***

2 Others [2017] eKLR as follows: **"The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.[5]In the above sense any intrusion of personal life by whatever means or form such as photography, written articles or caricatures may be ground for an action for breach of privacy."**

48. Similarly, in the **Kenya Human Rights Commission vs Communications Authority of Kenya & 4 Others [2018] eKLR** held:- **"Privacy is a fundamental human right, enshrined in numerous international human rights instruments. It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights such as freedom of expression, information, and association. The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction, and liberty, a "private sphere" with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals. Activities that restrict the right to privacy such as surveillance and censorship, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim and proportionate to the aim pursued."**

49. In view of the foregoing and having laid a basis for what privacy entails, the Respondent did not deny the publication of the Complainant's image on their social media pages specifically Instagram and Facebook. However, their defence mainly relies on consent they allegedly obtained from the complainant which was later withdrawn. The burden of proof is upon the Respondent to justify that they obtained consent before taking and publishing the photos as provided for under section 32 of the DPA.

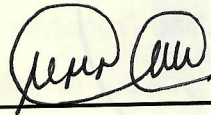
50. In this regard, it has been established by this Office that the consent sought was not sufficient neither satisfactory to the conditions of consent under the Act and the Regulations. The Complainant demonstrated that the Respondent took her photograph and published it in their social media pages without her consent as was held in ***Kamande v Nation Media Group (Constitutional Petition E004 of 2021) [2022] KEHC 16017 (KLR)*** where the law protected the Complainant's right to control her image or likeness and if the same was used for publicity or commercial gain by a third party, her consent should have been obtained.
51. Section 37 of the DPA equally provides that a person shall not use for commercial purposes data obtained unless express consent of the data subject has been sought and further that the Data subject has been informed of such use when collecting the data. The Respondent has not satisfied this office that they took such measures.
52. The Complainant sought an order for compensation of Kshs. 5,000,000 by the Respondent and relied on various case law as stated above to justify the same. Despite Section 65 of the DPA and Regulation 14(3)(e) The Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 giving this office the powers to grant such a remedy, the Office declines to do so on account of the mitigation measures taken by the Respondent to pull down the Complainant's image once she objected to the processing of her image on the Respondent's social media pages.
53. The Complainant also sought for a recommendation for prosecution and issuance of an enforcement notice to the Respondent. This office finds that a recommendation for prosecution is not applicable in this complaint as the Respondent was not liable for any criminal offence under the Act.

E. FINAL DETERMINATION

54. In consideration of all the facts of the complaint and evidence tendered, the Data Commissioner makes the following determination:

- i. The Respondent violated the Complainant's rights under section 26(a) and (c) of the Act.
- ii. The Respondent did not demonstrate that they fulfilled the duty to notify under Section 29 of the Act;
- iii. The Respondents did not satisfy the conditions of consent under Section 32 the Act as read with Regulation 4 The Data Protection (General) Regulations, 2021;
- iv. An Enforcement Notice is hereby issued to the Respondent.

DATED at **NAIROBI** this 17th day of July **2023**.



Immaculate Kassait, MBS

DATA COMMISSIONER