



**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 0608 OF 2023**

ISAYA LEMERKETO..... COMPLAINANT

-VERSUS-

THE KENYA SCHOOL OF LAW.....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

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 a Bar school in Kenya while the Complainant was a student at the said school.
6. Pursuant to Regulation 11 of the Regulations, the Office, notified the Respondent of the complaints filed against it vide a letter dated 9th June, 2023 referenced ODPC/CONF/1/5 VOL 1 (290) and required their response within 21 days. Upon receipt of the response, 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 response from the Respondent and investigations conducted by the Office.

B. NATURE OF THE COMPLAINT

8. The Respondent made flyers featuring the Complainant's image on applications for a Diploma in Law course.
9. The flyers were making rounds on the Respondent's social media platforms particularly, Instagram, Facebook and Whatsapp. The Complainant alleged that physical copies were also distributed.
10. The Complainant stated that the images were published in breach of his privacy and was aggrieved by invasion of privacy as he had never authorised the Respondent to use his image and has never been the School's ambassador.

ANALYSIS OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

11. The Complainant, through his advocate, filled the complaint's form and stated that the Respondent made flyers featuring his image on applications for a Diploma in Law course which they hand out physical copies in events and post on their social media pages and website.
12. The Complainant alleged that no written apology emanated from the Respondent despite demand of the same. He attached a demand letter dated 16th October 2022 referenced PN/LIT 10/2022. 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.
13. The Complainant attached a supporting affidavit to his complaint deposing the same details as indicated in the complaint form. He attached a copy his Identity Card and another image to confirm his likeness.
14. Preliminary investigations conducted by this Office demonstrated that the image on the Respondent's flyer and the image provided by the Complainant are a match and it was indeed the Complainant's image on the said flyer.
15. The Complainant stated that he was informed of the flyers in September 2022, but did not manage to get a hold of the physical copies.
16. The Complainant indicated links of Instagram and Facebook which he claimed contained his image. On both social media pages, the Complainant stated that his image was captured as the first left image on the front row and was pictured in his admission regalia.
17. However, preliminary investigations conducted by this Office established that the said image had been pulled down from the Respondent's Instagram and Facebook pages.
18. 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;
- iv. Issuance of an enforcement notice to the Respondent in accordance with the Act and the Regulations.

19. 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 he was exposed, the lack of remorse, the commercial exploitation of her image and the mental anguish.

20. The Complainant based his 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

21. The Respondent provided a response to the Notification of Complaint vide a letter dated 29th June, 2023 referenced KSL/DIR/GEN/1B V (005).

22. In the said letter, the Respondent denied invading the Complainant's right to privacy and taking any actions in contravention of the Act. The Respondent also stated that the Complainant failed to cite any provisions of the Act or Regulations that were breached.

23. The Respondent stated that in September, 2022, the School prepared flyers using images captured during a graduation ceremony of the School to announce its intake. It was on that premise that the Complainant contacted a member of staff on the day the advertisement was posted on the Respondent's website and objected to the same.
24. Upon receipt of his complaint, the brochure was withdrawn and all traces of the same were taken down from the site and the Respondent's social media and no physical copies were ever distributed. The Respondent provided evidence indicating that the post was pulled down from their Instagram page.
25. The Respondent also stated that the image was up for less than 24 hrs and the copy that the Complainant had in his possession was downloaded from their website and is not available online at all.
26. Further, the Respondent stated that the School in place of the previous flyers containing the Complainant's image, used a generic advert for the flyer and advertisement for the Paralegal Training Programme. They attached copies of the flyers adverts used by the School. The copies attached by the Respondent did not contain the Complainant's image.
27. The Respondent stated that it used the image of the Complainant in a School activity setting that took place in the public in good faith for public information purposes.
28. The Respondent indicated that it respects the privacy of students and has policies in place to protect the privacy of its students. The Respondent provided the following document as proof of the same:
- i. Complaints Handling Policy dated March 2023;
 - ii. Records Management Policy dated July 2022;
 - iii. An access to information mechanism;
 - iv. Data protection clauses in School contracts; and
 - v. A Documentary Consent Form.



29. The Respondent indicated that it continued to develop policies to protect the privacy of its students, staff and stakeholders and as a measure to ensure that the issue does not arise in future, it developed a consent form which allows students to opt in on School activities.
30. The Respondent also indicated that it is making arrangements to grow the policy framework that protects data including developing a data protection policy and other related policies.
31. On compensation, the Respondent stated that there were other more reasonable means of resolution that were appropriate in the instance. The Respondent averred that it acted in good faith and complied with the complainant's objection to the use of his images and wished to settle the matter amicably.
32. The Respondent stated that its quick action in the matter spared the Complainant of distress that may have been occasioned therefore compensation was not the appropriate remedy in the instance.
33. The Respondent prayed that the complaint be deemed resolved without any further orders.

C. ISSUES FOR DETERMINATION

34. Having considered the nature of the complaint, and the evidence adduced by all parties to the complaint, it is not in dispute that the Respondent used the Complainant's image on its flyers to advertise for the Diploma in Law courses on its website and other social media platforms.
35. It is also not in dispute that the Respondent used the image of the Complainant in a graduation gown in the publication of the flyers and brochures without prior notification of the use of his image. Further, the Respondent did not deny that it did not seek consent of the Complainant prior to the use of his image and therefore, lack of consent is also not an issue to be determined by this Office.

36. The issues for determination are therefore whether;

- i. the Respondent infringed the complainant's rights under the Data Protection Act; and
- ii. the Complainant is entitled to the remedies sought for the alleged breach.

I. WHETHER THE RESPONDENT INFRINGED THE COMPLAINANT'S RIGHTS UNDER THE DATA PROTECTION ACT

37. The right to privacy is enshrined in the Constitution under Article 31. The Act was enacted to effect Article 31 (c) and (d) which provides that every person has 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.

38. Further, the Act defines a data subject as an identified or identifiable natural person who is the subject of personal data. Personal data means any information relating to an identified or identifiable natural person. An identifiable natural person is person who can be identified directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social or social identity.

39. A data subject under Section 26 of the Act has the right to be informed of the use to which their personal data is to be put and to object to the processing of all or part of their personal data. The data subject in this case is the Complainant in this matter.

40. The Complainant has a right to know what his image is to be used for. This is clearly spelt out under Section 29 of the Act which states that a data controller or data processor shall, before collecting personal data, in so far as practicable, inform the data subject of the rights of data subject specified under section 26;

the fact that personal data is being collected; and the purpose for which the personal data is being collected.

41. In *Jessicar Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Center & 2 Others* (2017) eKLR, Mativo J. observed that;

"...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."

42. In view of the foregoing, the Respondent did violate the complainant's rights by not informing the complainant of his rights under sections 26 and 29 of the Act. However, it is pertinent to note that the Respondent resolved the said complaint within 24 hours and pulled down the said images.

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

43. The Complainant sought a declaration that the Respondent's actions amounted to breach of her right to privacy under Article 31 of the Constitution. This office declines to make such a declaration on the view that this is a preserve of the Courts on interpretation of the constitution.

44. Notably, with regards to issue of compensation, this office notes that the court did not award any compensation where the Respondent took swift action in the objection to processing of their data. In the same case as noted above of *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others [2017] eKLR* the court held as follows: "**From the material presented in this case, the evident lack of clarity as to whether or not there was consent and considering the swiftness with which the bill**

boards were removed I find that there is no material before me to demonstrate that the petitioner suffered any loss."

45. In view of the foregoing, this office declines to issue compensation to the complainant on account that the Respondent took swift action to remedy the breach of personal data.

46. The Complainant also sought for a recommendation for prosecution and issuance of an enforcement notice to the Respondent. Recommendation for prosecution is not applicable in this complaint as the Respondent was not liable for any criminal offence under the Act.

D. FINAL DETERMINATION

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

- i. The complaint against the Respondent stands resolved and as such it is closed.
- ii. Parties have a right of appeal.

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



Immaculate Kassait, MBS

DATA COMMISSIONER

