



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0660 OF 2023

ABDINUR KASSIM & LUQMAN HUSSEIN KASSIM (MINOR SUIING THROUGH HIS FATHER & NEXT FRIEND).....COMPLAINANT

-VERSUS-

JOYCE NJOKI NGUGI T/A KORA SPA.....RESPONDENT

DETERMINATION

(Pursuant to Section 8(f), 56 and 57 of the Data Protection Act, 2019, and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021)

A. INTRODUCTION

1. Article 31 (c) & (d) of the Constitution of Kenya, 2010 recognizes the right to privacy. The Data Protection Act, 2019 (hereinafter "the Act") was enacted to give effect to the right to privacy. Section 8 (1) (f) of the Act provides that the Office of the Data Protection Commissioner (hereinafter as "the Office") can receive and investigate any complaint by any person on infringements of the provisions of the Act. Furthermore, Section 55(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 is a regulatory Office, established pursuant to the Act. 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 8th May 2023, this Office received a complaint from Abdinur Kassim and Luqman Hussein Kassim (Minor suing through his father and next friend -- Hussein Kassim) represented by Messrs G.M. Orina & Co. Advocates ('Complainants') against Joyce Njoki Ngigi T/A Kora Spa ('Respondent')
4. On 5th 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 complaint filed against it. In the notification of the complaint filed against the Respondent, the Respondent was to provide: -
 - a) A response to the allegation made against Joyce Njoki Ngigi T/A Kora Spa by the complainant and, a contact person who can provide further details as regards this complaint;
 - b) Provide any relevant materials or evidence in support of their response above;
 - c) Details of how they collected, stored, and processed the complainants' data;
 - d) The legal basis relied upon to process and engage with the complainant and whether or how they fulfill the duty to notify under Section 29 of the Act;
 - e) Details (in writing) of:
 - (i) The mitigation measures adopted or being adopted to address matters arising from this complaint;
 - (ii) The technological and organizational safeguards that have been put in place to ensure that such occurrence mentioned in the complaint does not take place again; and

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- (iii) Your data protection policy outlining the complaints handling mechanisms to deal with matters relating to the rights of a data subject under the Act, the regulations, and any alleged contravention directed to your attention by data subjects.
- f) Demonstration (by way of a written statement) of its 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.
5. On 3rd July 2023, the Respondent filed its response to the complaint filed against it.
6. Upon receipt of the response, investigations were conducted as required by Regulation 13 (1) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations 2021.
7. 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 COMPLAINT

8. The complainant alleges that the Respondent processed the personal information relating to the minor for commercial purposes without consent of the data subject and the minor's guardian.
9. In affidavits deponed on 22nd June, 2023, the 1st Complainant (Abdinur Kassim) and the 2nd Complainant (sworn by Hussein Kassim the father of the minor – Luqman Hussen Kassim) making similar averments, stated that on or about 11th September, 2021, they visited the Respondent's place of business located at Fedha

- Business Park, Embakasi for the sole purpose and intention of obtaining barber services. They were attended to by the agents and/or servants of the Respondent, who proceeded to offer the barber services upon payment of requisite fee/charges.
10. Whilst in the course of receiving the services sought, agents and/or services of the Respondents took their photographs, which constitute personal data. At the time, they were focused on getting the services sought and did not have any idea why they were being photographed.
11. On 16th September 2021 between 7pm and 8pm, The Complainants aver that they discovered that the Respondent had published the photographs taken on their social media handles, particularly, in the Respondent's Facebook and Instagram handles under the caption "*Barbers are culturally significant @spa.kora @juan*".
12. It was the Claimants' averment that they did not consent to the photographs and there was thus no legal basis for the processing of their photographs by the Respondent.

C. THE RESPONDENT'S RESPONSE

13. On 3rd July 2023, the Respondent filed a response to the complaint filed against it.
14. In response to the Complaint, the Respondent denied processing the Complainant's data without consent and for the said commercial purposes. The Respondent stated that the photograph was not taken in an intrusive manner so as to amount to an infringement of the right to privacy. According to the Respondent, no intimate aspects of the claimants' personal lives were published and there cannot be a reasonable expectation of privacy.
15. The Respondent further stated that the attached photographs do not reveal the parties therein in a distressed, disheveled, or upset manner hence anodyne in nature. That demonstrably, this conduct coupled with the posture of the claimants unequivocally shows implied constructive consent.
16. It was the Respondent's averment that the Complaint was raised by persons with no written authority to file the complaint on behalf of the minor. The Respondent

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further stated that the evidence in support of the claim is electronic in nature and has been adduced without a certificate of electronic evidence hence the same is inadmissible pursuant to Section 106B of the Evidence Act.

17. The Respondent stated that the law on privacy in Kenya is premised on the principle of reasonable expectation of privacy, a principle borrowed from the House of Lords decision in *Campbell vs MGN Limited (2004)*. They also stated that there is no reasonable expectation of privacy in a public place and that routine acts such as visiting a barbershop should not attract any reasonable expectation of privacy pursuant to the decision.
18. It was averred that the caption on top of the photographs carries with it some generalized information that barbers are 'culturally significant' and does not convey any private information of the data subject and that is not advertisement or commercialization of the data. The Respondent stated that no evidence exists that the claimants' personal data was used for commercial purpose.
19. The Respondent also averred that from the objectionable photos attached the data subject is not identifiable by the general public and focusses more on the haircut style and not the person.
20. Further, it was the Respondent's position that the alleged infringing photos were pulled down immediately upon request by the data subject as per the Respondent's privacy policy. On this the Respondent placed reliance on the case of *Jessica Wanjiru -vs- Davinci (2017)eKLR*.

D. ISSUES FOR DETERMINATION

- i. Whether the Respondent processed the Complainants' personal data for commercial purposes without their consent.
- ii. Whether the Respondent has violated the principles of Data Protection as envisaged in the Data Protection Act, 2019.



E. ANALYSIS AND DETERMINATION

I. WHETHER THE RESPONDENT PROCESSED THE COMPLAINANTS' PERSONAL DATA FOR COMMERCIAL PURPOSES WITHOUT CONSENT.

21. Before delving into the substance of the complaint, the Office notes that upon conducting investigations into this case, we could not find the alleged photographs that were used for commercial purposes by the Respondent on the Respondent's social media platforms (Facebook & Instagram).

22. Notably, however, the Respondent in their response dated 3rd July, 2023 do not deny having posted the Complainant's image on their social media platforms. What they contend is that the photograph was not taken in an intrusive manner, the data subjects are not identifiable by the general public, that the parties are anodyne in nature implying constructive consent and that there was no reasonable expectation of privacy in a public spa (a public space). In their response, they state that the infringing photos were pulled down immediately upon request by the data subject.

23. Section 37 of the Act is couched in clear terms and provides as follows –

(1) A person shall not use, for commercial purposes, personal data obtained pursuant to the provisions of this Act unless the person—

(a) has sought and obtained express consent from a data subject; or
(b) is authorised to do so under any written law and the data subject has been informed of such use when collecting the data from the data subject.

(2) A data controller or data processor that uses personal data for commercial purposes shall, where possible, anonymise the data in such a manner as to ensure that the data subject is no longer identifiable.

24. On its part, Regulation 14 of the Data Protection (General) Regulations, 2021 states that a data controller shall be considered to use personal data for commercial purposes where personal data of a data subject is used to advance commercial or economic interests, including inducing another person to buy, rent, lease, join, subscribe to, provide or exchange products, property, information or services, or enabling or effecting, directly or indirectly, a commercial transaction.

25. Following from the above definition, this Office finds that the photographs posted on the Respondent's social media pages were aimed at advertising the Respondent's business and were thus used for commercial purposes. There was no attempt to anonymise the data subjects, who are clearly identifiable from the photographs.

26. Publishing personal data on the such platforms exposes individuals to risks of their fundamental data protection rights and may also cause real damage and harm to effected data subjects, particularly, loss of control over their personal data. Where the personal data is that of a minor, Section 33 of the Act provides thus –

(1) Every data controller or data processor shall not process personal data relating to a child unless—

(a) consent is given by the child's parent or guardian; and

(b) the processing is in such a manner that protects and advances the rights and best interests of the child.

27. There is no evidence before this Office that the Respondent processed the personal data relating to the 2nd Complainant with the consent of his parent/guardian. The processing of the child's image was, in fact, not in a manner that protects and advances the rights and best interests of the child.

28. The Respondent, as the data controller, has failed to demonstrate that they obtained the express consent of the 1st Complainant himself and the express consent of the parent/guardian of the 2nd Complainant, to post their photographs on their social media platforms. The conditions of consent are provided for under

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Section 32 of the Act where subsection (1) places the burden of proof upon the data controller and data processor to prove that they obtained the data subject's consent to the processing of their personal data for a specified purpose.

29. Further, Regulation 4 of the Data Protection (General) Regulations, 2021, 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.**

30. Sub-regulation 3 states 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*.

31. The images posted identify natural persons and should not be posted *via* social media or any other online platform without the express consent of the data subject as provided in Section 22(1)(a) as read with Section 33(1) of the Act. To this end, the contention by the Respondent that by their anodyne nature, the Complainants implied constructive consent fails. For purposes of processing of personal data for commercial purposes, i.e. advertising, **consent** must be **express**.

II. WHETHER THE RESPONDENT HAS VIOLATED THE PRINCIPLES OF DATA PROTECTION AS ENVISAGED IN THE DATA PROTECTION ACT, 2019

32. Section 25 of the Data Protection Act provides for the principles of data protection.

25. Principles of data protection

Every data controller or data processor shall ensure that personal data is:

- i. Processed in accordance with the right to privacy of the data subject;*
- ii. Processed lawfully, fairly, and in a transparent manner in relation to any data subject;*
- iii. Collected for explicit, specified, and legitimate purposes and not further processed in a manner incompatible with those purposes;*
- iv. Adequate, relevant, limited to what is necessary in relation to the purposes for which it is processed;*
- v. Collected only where a valid explanation is provided whenever information relating to family or private affairs is required;*
- vi. Accurate and, where necessary, kept up to date, with every reasonable step being taken to ensure that any inaccurate personal data is erased or rectified without delay;*
- vii. Kept in a form which identifies the data subjects for no longer than is necessary for the purposes for which it was collected; and*
- viii. Not transferred outside Kenya, unless there is proof of adequate data protection safeguards or consent from the data subject.*

33. The Office finds that by uploading the Complainants' photographs on their social media platforms without their consent, the Respondent did not process the personal data in a manner that complied with the right to privacy of the data subject. The processing was neither lawful, fair, or transparent. The data subjects were not informed of the explicit, specified and legitimate purposes for which the photographs were processed.

34. However, the Office notes that the Complainants exercised their rights as envisaged under Section 26 of the Act with the Respondent in the first instance and the photographs were pulled down. Noting that this complaint was filed on 8th May, 2023, in respect of photographs that were taken and posted on 11th September, 2021, this Office is unable to establish the length which the photographs remained online. Nonetheless, in conducting its investigations as mentioned hereinbefore, this Office did not find the photographs on any of the Respondent's social media platforms.

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F. FINAL DETERMINATION

35. The Data Commissioner therefore makes the following final determination;

- i. A declaration is hereby issued that the Respondent did not obtain the express consent of the Complainants to process their personal data for commercial purposes, contrary to Section 37 of the Act.
- ii. An Enforcement Notice do issue against the Respondent.
- iii. Parties have the right to appeal this determination to the High Court of Kenya.

DATED at **NAIROBI** this 5th day of August 2023.



Immaculate Kassait, MBS