



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1728 OF 2023

ROBERT AKA "AUTHENTIC BALES"COMPLAINANT

-VERSUS-

ZEROX TECHNOLOGY COMPANY LTD.....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 Office received a complaint from the Complainant on 22nd September 2023 against the Respondent, alleging that he was added to a fund raising Whatsapp group as he had been listed as a guarantor for a loanee whom he does not know and he was not aware of.

B. LEGAL BASIS

2. 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.
3. The Office of the Data Protection Commissioner (hereinafter 'this Office' and/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.
5. This determination is pegged on the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (the Enforcement Regulations) which states that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

C. BACKGROUND OF THE COMPLAINT

6. This Office received a complaint from the Complainant on 22nd September 2023. The complaint was lodged 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.
7. Zerox Technology Company Ltd (hereinafter the 'Respondent') is a digital credit provider with a money lending product known as **Asap Kash**.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *via* a letter dated 1st November, 2023 referenced ODPC/CONF/1/5 VOL 1 (520). In the notification of the complaint, the Respondent was to provide: -
 - a. A response to the allegation made against them by the Complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. The legal basis relied upon to process and engage with the Complainant pursuant to Section 30 of the Act;

- d. Whether or how it fulfilled the duty to notify under Section 29 of the Act; and
 - e. Details of how it obtained all the contacts that it added into the Whatsapp group.
9. The Respondent responded to the notifications of complaint *via* a letter dated 8th November 2023.
10. This determination is therefore as a result of analysis of the complaint as received and the response from the Respondent.

D. NATURE OF THE COMPLAINT

11. The Complainant alleged that he was added to a fund-raising Whatsapp group by Asap Kash, a money lending product of the Respondent. He alleged that the Respondent's staff purported that he was listed as a guarantor for somebody who he was not aware of and never heard of. The staff allegedly persisted on calling him and that this was not the first time he was being added to a Whatsapp group by the same company.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

12. The Complainant provided screenshots of a Whatsapp group that he was added to without his consent.

ii. THE RESPONDENT'S RESPONSE

13. In its response, the Respondent indicated that it received the Complainant's complaint concerning his addition to the Whatsapp group and responded to him the same day.
14. The Respondent stated that it regretted the behaviour of one of their employees who created the fundraising group without its authority and action was taken against her and was suspended from work on 25th September 2023.

The Respondent did not provide proof of suspension of its employee.

15. The Respondent stated that it was in the process of sorting out the complaint as per their internal redress mechanism under Section 29 of the Act and shall communicate the outcome of the Complainant's redress within two weeks.

16. The Respondent provided an email extract from themselves to the Complainant containing an apology to him. However, the Complainant did not accept this apology necessitating this determination.

F. ISSUES FOR DETERMINATION

17. The following issues fall for determination by this Office:

- i. Whether there was a violation of Complainant's rights under the Act;
- ii. Whether the Respondent fulfilled its obligations under the Act; and
- iii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THERE WAS A VIOLATION OF COMPLAINANT'S RIGHTS UNDER THE ACT

18. The Complainant is a data subject within the definition of the Act and therefore has rights under Section 26 of the Act. Particularly, the Complainant had the right to be **informed** of the use to which their personal data is to be put.

19. Personal data is defined under Section 2 of the Act as **any information** relating to an identified or an identifiable natural person.

20. The Complainant had the right to be informed of the use to which his personal data, particularly his phone numbers, was to be put.

21. The Respondent in its response admitted that their employee created the Whatsapp group and added the Complainant without his consent.

22. This Office therefore finds that the Complainant's rights under Section 26 (a) of the Act was violated by the Respondent.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

23. The Respondent is a data controller and a data processor within the definitions of the Act and therefore has obligations pursuant to the Act.
24. The Respondent has an obligation under Section 25 of the Act to adhere to the principles of data protection while processing the Complainant's personal data. Particularly, the Respondent is obligated under Sections 25 (a), (b) and (c) of the Act to ensure that personal data is processed in accordance with the right to privacy of the data subject, processed lawfully, fairly and in a transparent manner in relation to the data subject, and is collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes.
25. Afore-analysis has shown that the Respondent did not uphold the Complainants' rights under Section 26 (a) as read with Section 25 (a) of the Act, did not process the Complainant's personal data lawfully, fairly and in a transparent manner contrary to Section 25 (b) of the Act did not collect his personal data for legitimate purposes contrary to Section 25 (c) of the Act. The Respondent therefore, failed to fulfil its obligations under the Act.
26. Further, Section 28 (1) of the Act provides that a data controller or processor shall collect personal data **directly** from the data subject. It was not clear from the Respondent's response where they got the Complainant's phone number in order to add him to a Whatsapp group without his consent.
27. With regards to the duty to notify, the Respondent had an obligation under Section 29 of the Act to, before collecting their personal data, notify the Complainant of, among others:
- a) their rights under Section 26 of the Act;
 - b) the fact that their personal data was being collected;
 - c) the purposes for which their personal data was being collected;

- d) the contacts of the Respondent and whether any other entity may receive the collected personal data; and
- e) a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

28. From their response, the Respondent did not notify the Complainant of any of the above. The Respondent had a duty to notify the Complainant the fact that his personal data was in their possession and his rights under the Act, among the other notifications under Section 29 of the Act.

29. Section 30 of the Act sets out the instances where a data controller or processor can lawfully process personal data. It states that a data controller or processor **shall not** process data unless the data subject consents to the processing for one or more specified purposes or the process is necessary for the reasons given in subsection (b) thereof.

30. The Respondent failed to prove that the processing of the Complainant's phone number was necessary for any of the reasons stated in Section 30 (1) (b) of the Act.

31. Section 32 of the Act provides for the conditions of consent and provides that a data controller and processor shall bear the burden of proof to establish that the data subject consented to the processing of their personal data for a specified purpose.

32. The Respondent failed to discharge this burden by stating that it is their employee who created the fundraising group. As the data controller, the Respondent ought to have put in place measures to ensure that the data subject consented to be listed as a guarantor and consented to being added to a Whatsapp group in case the loanee defaulted to repay the loan.

33. Further, Section 41 of the Act as read with Part V of the Data Protection (General) Regulations, 2021 provides for data protection by design or by default.

34. This Office has received numerous complaints against this particular Respondent. Therefore, it is clear that the Respondent has not implemented this requirement within its organization and its systems do not comply with the provisions of the Act to incorporate data protection by design and by default.

35. From the above, this Office finds that the Respondent did not fulfil its obligations as stipulated under the Act.

III. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS.

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

37. Having found that the Respondent failed to fulfil its obligations under the Act, an Enforcement Notice shall be issued against the Respondent pursuant to Section 58 of the Act.

38. Further, Section 65 (1) of the Act provides for compensation to a data subject and states that a person who suffers damage by reason of a contravention of a requirement of the Act is entitled to compensation for that damage from the data controller. Section 65 (4) of the Act states that "damage" includes financial loss and damage not involving financial loss, including distress.

39. Regulation 14 (3) (e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

40. Based on the Respondent's violation and infringement of the Complainant's rights, the Data Commissioner makes an order for nominal damages of Kshs. 20,000 to be paid by the Respondent to the Complainant.

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for violating the Complainant's rights and failing to fulfil its obligations under the Act.
- ii. An Enforcement Notice be issued against the Respondent.
- iii. An order for nominal damages of Kshs. 20,000 to be paid to the Complainant by the Respondent.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 11th day of December 2023.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER