



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1770 OF 2023

MOHAMMED ORUKOH..... COMPLAINANT

-VERSUS-

KORU COUNTRY CLUB.....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. This Complaint is in respect of the Complainant's claim that the Respondent used his photograph on its official Facebook account for advertisement of their facilities (swimming pool etc.) without obtaining consent from the Complainant.

B. LEGAL BASIS

2. Article 31 (c) and (d) of the Constitution of Kenya 2010 provides for the right to privacy. Consequently, to further guarantee the same, the Data Protection Act, 2019 (hereinafter 'the Act') was enacted.
3. The Office of the Data Protection Commissioner (hereinafter 'this Office' 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.

C. BACKGROUND

5. The Office received a complaint by Mohammed Orukoh (hereinafter 'the Complainant') on 26th September 2023 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.
6. Pursuant to Regulation 11 of the Enforcement Regulations, on 6th October 2023, this Office notified the Respondent of the complaint filed against it *vide* a letter dated 3rd October 2023 referenced ODPC/CONF/1/5 VOL 1 (459) and required their response within 14 days.
7. The Respondent responded to the notification of the complaint letter *vide* a letter dated 6th October 2023. This letter was emailed to this office on the same day.
8. On 11th October 2023, upon review of the Respondent's Response, this Office forwarded the Respondent's Response to the notification wanting him to confirm the Respondent's assertions contained in its letter dated 6th October 2023. The Complainant denied the Respondent's assertions, especially the aspect that the Respondent obtained his consent before processing his personal data.
9. Upon further review of all the Responses and documents adduced, and considering the crux of the complaint relates to the issue of consent, on 31st October 2023 this Office wrote to the Respondent to adduce the purported consent by which it relied upon to process the Complainant's personal data. The Respondent was to also confirm whether the photo was still online and if it had been removed, it was to inform this Office when it was removed. To date, the

Respondent has never replied to our letter dated 31st October 2023. The proof of Consent has never been adduced and the Respondent has not confirmed whether they pulled down the Complainant's image from their Facebook account.

10. This determination is therefore a result of analysis of the complaint as received, the responses from the Respondent and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

I. COMPLAINANT'S CASE

11. The Complaint alleges that the Respondent posted and used his photo in their official Facebook account to advertise their facilities, including a swimming pool, from 24th May 2022. That he is a married man with children and the photo of his being half-naked hurts his reputation as a teacher, a father, and son in law, given that he comes from a very strong Christian background.

12. The Complainant further alleges that the photo was taken without his consent and that the Respondent has maintained it on its platform for over one year. He also alleges that he does not understand why the respondent chose only his photo yet they went to the Respondent's premises as a staff of about 20 teachers.

II. RESPONDENT'S CASE

13. As stated above the Respondent provided a response to the allegations against it on 6th October 2023.

14. In the response, the Respondent stated:

- (i) That as an institution they respect the privacy of their guests and the Data Protection Act, 2019 and would never take photos of their guests without their consent to use them in their marketing material and/or social media platforms whatsoever.
- (ii) That the Complainant herein is their frequent customer known to most of their staff and has visited their facility several times before and after May 24, 2022.

(iii) That on the material day of 24th May 2022, the Complainant visited their facility in the company of his colleagues, being teachers or non-teaching staff from a school and one of their staff by the name Edward Ochieng Ochola personally spoke to the Complainant and sought his consent to take the pictures and use them on their social media platforms and that it is malicious to record a complaint 17 months after the post was done.

(v) That in the circumstances, the Complainant, during his several visits to the facility, has taken several photos within their facility and posted the same on his Facebook account without the Respondent's consent and or permission.

(vi) The Respondent further raised a counter-argument that on diverse dates between 21st May 2022 and 1st June 2022, the Complainant while on their premises took pictures with their Hotel Branded Mercedes Benz silver in Colour and the Respondent's personal Range Rover 4.6 Hse Light blue and posted the pictures on his Facebook account without the consent of the Respondent's management.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

15. The Complainant, submitted his complaint *via* the Office's e-mail on 26th September 2023. As part of his evidence, the complainant adduced screenshots of the photos used by the Respondent on their Facebook account for advertising purposes.

II. THE RESPONDENT'S EVIDENCE

16. In response to the Complaint, the Respondent submitted copies of screenshots of the Complainant's Facebook page. This included two pictures purportedly uploaded by the Complainant on his Facebook page and taken at the Respondent's facility on 21st May, 2022 and a picture purportedly uploaded on 1st June, 2022

taken by the Complainant next to the Respondent's Hotel Branded Mercedes Benz vehicle.

F. UNDISPUTED FACTS

17. On or about May 2022, the Complainant visited the Respondent's premises.

18. The Complainant's photo, image, and/or likeness was taken and posted by the Respondent on its official business and social platform with the caption "*Did you know that our swimming pool is now fully operational loaded with a pool bar? Come and enjoy our cocktails at the poolside*"

G. ISSUES FOR DETERMINATION

19. Having considered the nature of the complaint, the evidence adduced by all parties to the complaint and the investigations conducted by this Office, the issues for determination that arise are:-

- i. Whether the Complainant's personal data was processed as per the law;
- ii. Whether the Complainant's rights were infringed upon; and
- iii. Whether the Complainant is entitled to any remedy under the Act.

H. ANALYSIS AND DETERMINATION

I. WHETHER THE COMPLAINANT'S PERSONAL DATA WAS PROCESSED AS PER THE LAW.

20. As earlier stated this complaint relates to the processing of personal data wherein the Complainant alleges that his data was processed without his consent.

21. Section 30 of the Data Protection Act provides the lawful basis for the processing of personal data. It provides:-

30. Lawful processing of personal data

(1) A data controller or data processor shall not process personal data, unless

(a) the data subject consents to the processing for one or more specified purposes;

or

(b)

II. WHETHER THE COMPLAINANT'S RIGHTS WERE INFRINGED UPON

31. Section 26 of the Act outlines the rights of a data subject, including the right to be informed of the use to which their personal data is to be put. The Act states that:

A data subject has a right—

- (a) *to be informed of the use to which their personal data is to be put;*
- (b) *to access their personal data in the custody of the data controller or data processor;*
- (c) *to object to the processing of all or part of their personal data;*
- (d) *to correction of false or misleading data; and*
- (e) *to deletion of false or misleading data about them.*

(Emphasis Ours)

32. From the above provision of law it is evident that one needs to be informed of the use to which his or her personal data is to be put. This right to be informed enables the data subject to make a conscious decision relating to the use of his/ her personal data. It is from being informed and the information given to the data subject that the data subject gets to elect and/or choose whether to consent to the processing of his/ her personal data or not. As stated earlier herein, valid consent is a product of conscious decision-making.

33. With regards to this complaint, having established that there was no valid consent given, it therefore follows that the Complainant was never informed of the use of his photograph for him to be able to consent to the processing of his image.

34. It is therefore our finding that the right of the Complainant to be informed of the use to which his personal data is to be put was violated and as such the Respondent is found liable for violation of the Complainant's rights.

III. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDY

response and to comprehensively defend itself from the allegations brought against it by the Complainant, the Respondent did not do so. Nonetheless, the investigations conducted by this Office have shown that the Complainant's image has been pulled down from the Respondent's Facebook account.

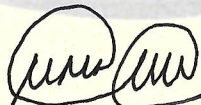
36. In view of the foregoing, this Office concludes that the Complainant is entitled to the remedies as envisioned under the Act. That being said, the Respondent is hereby directed to compensate the Complainant Kshs. **750, 000/= (Seven Hundred and Fifty Thousand shillings Only)** for the use of his image for commercial gain without his consent and for the infringement and/ or violation of his rights.

I. FINAL DETERMINATION

37. In the ultimate, the Data Commissioner therefore makes the following final determination:

- i. The Respondent is hereby found liable for using the Complainant's image for commercial gain without his knowledge and consent thereby violating his rights as envisaged in the Data Protection Act No. 24 of 2019.
- ii. The Respondent is ordered to Compensate the Complainant **KES 750, 000/= (Seven Hundred and Fifty Thousand Kenya Shillings Only)**
- iii. Parties have the right to appeal this determination to the High Court of Kenya within 30 days.

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



Immaculate Kassait, MBS
DATA COMMISSIONER

