



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1775 OF 2023

JEREMY OBANO..... COMPLAINANT

-VERSUS-

KENYA AIRWAYS PLC.....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 declined to provide the Complainant with a recording of a telephone voice call that he made to the Respondent.

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.

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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 Jeremy Obano (hereinafter 'the Complainant') on 27th 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 10th November 2023, this Office notified the Respondent of the complaint filed against it *vide* a letter dated 8th November 2023 referenced ODPC/CONF/1/5 VOL 1 (539) and required their response within 14 days.
7. The Respondent responded to the notification of the complaint letter *vide* a letter dated 24th November 2023 and received by this Office on 27th November 2023.
8. On 28th November 2023, upon review of the Respondent's Response, this Office forwarded the Respondent's Response to the notification wanting him to confirm that the Respondent has reached out to him with regards to his complaint as was outlined in the Respondent's Response to this Office's notification of complaint letter.
9. This determination is therefore a result of analysis of the complaint as received, the responses from the Respondent and investigations conducted by the Office.

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D. NATURE OF THE COMPLAINT

I. COMPLAINANT'S CASE

10. It is the Complainant's case that on or about 10th June, 2023, he contacted the Respondent relating to their services as an airline carrier *via* a telephone call. The Complainant alleges that the telephone call was recorded by the Respondent. He states that he later requested to be given access to the telephone voice recording of the call. The Complainant further states that the Respondent refused to give him the telephone voice recording despite his request to be given the same. Additionally, he stated that the Chief Executive Officer (CEO) of the Respondent is aware of this request.

II. RESPONDENT'S CASE

11. As stated above the Respondent responded to the allegations against it on 27th November 2023. In the response, the Respondent stated as below as regards the substance of the Complaint:

- (i) As per the extract of the complaint provided, the Complainant who is an esteemed customer and a frequent flier of Kenya Airways ('KQ') seeks a recording of a call made to the controller as a subject. The impact of the alleged infringement is inconvenience suffered by his mother and himself as KQ refused to carry out his wishes, and the effect is that it was unacceptable and contrary to the health, safety and disability acts;
- (ii) The complainant alleges that the potential harm or urgency is that his mother was not provided with a wheelchair which caused her harm and distress in such a busy and taxing environment;
- (iii) In line with its mission, KQ has been dealing with this complaint and notes that the report to the Office of the Data Protection Commissioner was while internal mechanisms of resolution were ongoing;
- (iv) Secondly, the Respondent opines that in light of the definition of personal data under Section 2 of the Data Protection Act and Section 4 on the application of the Act, the said complaint does not fall within the scope of

the Act and consequently that of the Office of the Data Protection Commissioner. The complainant on the said recording gives no personal data and he is not identifiable. The Complainant states that the alleged breach is on health and safety laws;

- (v) Further, releasing the recording to the Complainant will in turn infringe on the data protection of the Customer Excellence Centre agent who fully identifies herself;
- (vi) That the impact of the alleged breach and the harm and distress the Complainant alleges is not only retrospective but also not within the ambit of the Data Protection Act. It is noteworthy the historical conduct of the Complainant against the airline has been out to seek rebates and upgrades;
- (vii) KQ is a registered Data Controller. This follows an extensive Data Protection Impact Assessment and actions taken to protect personal data and sensitive personal data for all our guests and stakeholders. As an international Company, the threshold for compliance is higher as the data processed includes guests covered by both the Kenyan Data Protection Act and various other regulations such as the General Data Protection Regulation (EU GDPR) and the Indian Digital Personal Data Protection Act (DPDPA) among many others;
- (viii) KQ has laid out an elaborate policy that is front and center of the data processing of all their guests as set out in the Privacy Policy. The policy covers inter alia the collection of Sensitive Personal Information, Purposes of Processing and legal bases for Processing Disclosure of Personal Information to third parties Profiling, International transfer of Personal Information, Information security, accuracy minimization, and retention;
- (ix) Further in addition to the above and for continuous improvement, KQ Reviews all incidents as an Opportunity for Improvement and all requisite agents are re-trained on KQ product knowledge & standards of service including Data Subject Request Rights (DSSR), Continuous monitoring &

improvement of the quality of service offered at all customer touchpoints;
and

- (x) KQ is committed to compliance with the Kenya Data Protection Laws & Regulations. KQ is ready and willing to collaborate with the Office of The Data Protection Commissioner and receive direction and guidance on this exercise.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

12. The Complainant submitted his complaint *via* the Office's e-mail on 27th September 2023. As part of his evidence, the complainant adduced a copy of the email conversation trail between the Complainant and the Respondent's management detailing the steps he had taken in accessing the purported voice recording from the Respondent, and the Respondent's responses.

II. THE RESPONDENT'S EVIDENCE

13. In response to the Complaint, the Respondent only responded to the complaint in the letter dated 24th November, 2023 and did not adduce any evidence.

F. ISSUES FOR DETERMINATION

14. 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 rights were infringed upon; and
- ii. Whether the Complainant is entitled to any remedy under the Act.

G. ANALYSIS AND DETERMINATION

I. WHETHER THE COMPLAINANT'S RIGHTS WERE INFRINGED UPON

15. Section 26 of the Act outlines the rights of a data subject, including the right to access their personal data in the custody of the data controller or data processor. 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)*

16. From the above summary of the complaint, the crux of this complaint relates to the right of access to personal data in the custody of the data controller or data processor.

17. To contextualize the complaint, the Complainant alleges that he was exercising his right to access his personal data in the form of a telephone call voice recording from the Respondent, and the Respondent did not avail and/or provide the said telephone voice call recording to him.

18. The position of the Respondent as contained in their response to the complaint is that in light of the definition of personal data under Section 2 of the Act and Section 4 on the application of the Act, the complaint does not fall within the scope of the Act and that of this Office.

19. From the above, the question that arises is whether one's voice and/or voice recording constitutes personal data as contemplated by the Act. If this question is answered in the affirmative, then the Complainant's rights would have been violated as from the facts of the case it is uncontested that the said telephone voice recording was not availed to him.

20. "Data" is defined in Section 2 of the Act to mean information which—

(a) is processed by means of equipment operating automatically in response to instructions given for that purpose;

(b) is recorded with intention that it should be processed by means of such equipment;

(c) is recorded as part of a relevant filing system;

(d) where it does not fall under paragraphs (a), (b) or (c), forms part of an accessible record; or

(e) is recorded information which is held by a public entity and does not fall within any of paragraphs (a) to (d).

21. "Personal data" is defined as "any information relating to an identified or identifiable natural person." (emphasis)

22. "An identifiable natural person" is further defined as "*a 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.*" (emphasis)

23. Simply put, personal data is any information relating to a person's 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.

24. With regards to what encompasses physiological factors, Section 2 of the Act unbundles the term "physiological" under the definition of "biometric data" where it defines biometric data as *personal data resulting from specific technical processing based on physical, physiological or behavioural characterization including blood typing, fingerprinting, deoxyribonucleic acid (DNA) analysis, earlobe geometry, retinal scanning, and voice recognition.*

25. From the above definition, it is discernible that voice recognition is biometric data as it results from specific technical processing based on physiological characterization. Using voice recognition techniques, one can be able to recognize

whose voice it belongs to and thereby identify the individual. The individual is also identifiable by combining identifiers, for instance if he/she mentions any other personally identifiable information (PII) in the call, such as their name/mobile contact/email address *et cetera*.

26. The Complainant states that his conversation with one of the Respondent's employees was recorded by the Respondent. The referenced conversation related to a complaint that the Complainant had on some flight-related issues that he sought to be addressed by the Respondent. These flight-related issues allegedly had caused the Complainant and his mother potential harm and distress, as he puts it.

27. In an email dated 31st August, 2023, the Respondent's Chief Executive Officer stated, *inter alia*,

"...we listened to the call and during your conversation, it would appear you were very agitated and therefore aggressive. This made it difficult for our agent to help you..."

28. It was therefore not in doubt that the information processed and collected by the Respondent **relates to** the Complainant, and as such it is the Complainant's personal data.

29. Having answered the question of whether the voice recording constituted the Complainant's personal data in the affirmative, it then follows that the Complainant's right to access his personal data was violated.

30. Section 26 (b) of the Act as read together with Regulation 9 of the Data Protection (General) Regulations, 2021 guarantees data subjects the right to access their personal data upon making a request to the data controller or data processor for the said access.

31. Regulation 9 (1) of the Data Protection (General) Regulations, 2021 provides *inter alia* that a data subject has a right to obtain from the data controller or data processor confirmation as to whether or not personal data concerning them is being processed, and, where that is the case, access to the personal data.

32. Pursuant to Regulation 9 (3)(a) of the Data Protection (General) Regulations, 2021 a data controller or processor has an obligation, on request by the data subject, to provide access to a data subject of his/her personal data in the possession of the data controller. The request to access of personal data is to be complied within seven (7) days from the date of the request by virtue of Regulation 9(4) of the Data Protection (General) Regulations, 2021.
33. With regard to the complaint at hand, the Complainant rightfully exercised his right to access his personal data from the Respondent. The Respondent had the obligation to avail the same to him within 7 days from the date of the request. To date, this Office notes that the Complainant's request for access to his personal data has never been honoured by the Respondent.
34. In as much as the Respondent states in its response that releasing the recording to the Complainant will, in turn, infringe on the data protection rights of the customer excellence centre agent who fully identifies herself, this Office finds that such an excuse for not giving the Complainant access to his personal data does not hold any water at all.
35. Practically, a telephone call recording will more often than not contain the personal data of another individual and this cannot be deemed a reason for refusal of a data access request.
36. Section 41 (1) of the Act enjoins data controllers and data processors to implement appropriate technical and organizational measures which are designed to implement the data protection principles in an effective manner and to integrate necessary safeguards for that purpose into the processing. To this end, the Respondent ought to have adopted the requisite security measures such as anonymization and concealment of its customer excellence centre agent's personal data to remove any identifiers so as to safeguard the agent's privacy rights and ensure they give effect to the Complainant's right of access.
37. To conclude this point, and being alive to the fact that to date the Respondent is yet to avail the requested telephone call recording to the Complainant, this Office

finds that the Complainant's right to access to his personal data has been infringed by the Respondent.

38. As to the question of the application of the Act to this complaint raised by the Respondent, this Office finds that the Act is applicable to this Complaint as, pursuant to Section 4 of the Act, the Complaint is against Kenya Airways (KQ), a data controller that is established in Kenya and processes data while in Kenya.

39. Moreover, the Respondent's CEO having confirmed that he listened to the voice recording, it cannot be disputed that the said voice recording was entered in a record by the Respondent by making use of either automated or non-automated means. KQ processed the Complainant's personal data for specific purposes, therefore, there is a corresponding right of access to the said data by the Complainant.

40. The complaint falls squarely within the ambit of the Data Protection Act, 2019 and thus, this Office.

II. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDY UNDER THE ACT.

41. 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.

42. 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.

43. This Office has considered the merits of the complaint; the evidence adduced by the Complainant and the Respondent's response thereto. In the Complaint filed with this Office, the Complainant has sought the remedy of compensation for harm and distress.



44. In view of the foregoing, this Office concludes that the Complainant is entitled to the remedy as envisioned under the Act.

45. To this end, the Respondent is hereby directed to compensate the Complainant **Kshs. 250,000/= (Two Hundred and Fifty Thousand shillings Only)** for the violation of his right to access his personal data.

H. FINAL DETERMINATION

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

- i. The Complainant's right to access his personal data was infringed upon.
- ii. The Respondent to facilitate the Complainant's data access request in accordance with Section 26 (b) of the Act as read with Regulation 9 of the Data Protection (General) Regulations, 2021, within **7 days** from the date of service of this Determination.
- iii. The Respondent is hereby ordered to Compensate the Complainant **KES 250,000/= (Two Hundred and Fifty Thousand Kenya Shillings Only)**
- iv. Parties have the right to appeal this determination to the High Court of Kenya within 30 days.

DATED at **NAIROBI** this 15th day of December 2023



Immaculate Kassait, MBS
DATA COMMISSIONER