



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1963 OF 2023

HELLEN MUTHONI..... COMPLAINANT

-VERSUS-

SOLPIA KENYA LIMITED

T/A SISTAR KENYARESPONDENT

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 her image commercially to market and advertise its hair product on social media platforms.

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 dated 6th October, 2023 by Hellen Muthoni (hereinafter 'the Complainant'), on 9th October 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 28th November 2023, this Office notified the Respondent of the complaint filed against it *vide* a letter dated 27th November 2023 referenced ODPC/CONF/1/5 VOL 1 (889) and required their response within 14 days.
7. The Respondent, through their Advocates, responded to the notification of the complaint letter *vide* a letter dated 1st December 2023 and received by this Office on 7th December 2023.
8. 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

9. It is the Complainant's case that the Complainant data subject is among other things, an established and renowned television host, Gospel artist, Youth Mentor, public figure, entrepreneur, and media personality who works at Inooro TV, a Kikuyu dialect television broadcast station of Royal Media Service. The

Complainant has worked for Royal Media Service since 2016 and has since been working on, and enhancing her professional image as a TV personality, influencer, Artist, entrepreneur, and also a marketer.

10. The Complainant states that over time, she has amassed so much influence, especially among Christians, the youth, and Kenyan public in general by virtue of her popularity in hosting Inooro TV's Sunday show "Rurumuka."
11. That having enhanced her professional image among youth and other ages as an influencer and media personality, her image has been used commercially to market and advertise different products on her social media pages subject to mutually agreeable terms. Also, being a media personality and business lady, she had invested heavily in her general demeanor, countenance, fashion, and presentation for commercial exploitation.
12. The Complainant avers that she has also invested in building her social media followership and managed then to attract 406,000 followers on Facebook and 17,000 on Twitter and 153,000 on Instagram and it is on that basis that she has endorsed several corporate products and conducted advertisements on social sites.
13. Sometime in October 2020, the Complainant states that she went to a salon to make her hair. She did a unique hairstyle, took a photo with her phone, and posted it on her social media platforms as a way of engaging with her followers and supporters. The image was posted both on her Instagram page and Facebook account.
14. That the photo post done on 2nd October 2020 by the Complainant and was accompanied by the following statement,

"How long can you stay without food? A year? Or more" nooo you can not survive, and so it is when you stay without feeding your spirit man with the word of God, you can not survive!!!"

15. That on the 6th October 2020, the Respondent without consent, permission, or authorization obtained and posted the Complainant's image and likeness both on its Facebook account and Instagram page to market and advertise its hair products

for commercial use, which action infringes on the Complainant's fundamental rights and freedom, dignity and violates her rights to privacy.

16. The Complainant states that to this end, the Respondent acted unlawfully, unconstitutionally and breached the complainant's fundamental rights and freedoms by taking advantage of her popularity, image, influence, and brand to gain financially and commercially through its advertisement on social sites in contravention of Section 37 of Data Protection Act, No. 24 of 2019 Laws of Kenya and Part III of Data Protection (General) Regulations, 2021.

17. That by a Facebook post on 6th October 2020, the Respondent published the following message coupled with the Complainant's image and likeness-

"<AFRO BULK TWIST> Crochet braid

Girls with natural hairstyles. We found a hair inspiration by @hellen msoo in #afrobulktwist. A true fireball. #Repost @ hellen_msoo (with @report from insta)"

18. According to the Complainant, the same message was copied verbatim on the Respondent's Instagram page. On both social media, the Respondent included the Complainant's social media names for easy access by its customers in verifying her veracity as a public figure endorsing the Respondent's products.

19. The Complainant states that the Respondent's customers were able to access the Complainant's account for reference in satisfying their interests. Numerous customers were interested in the Respondent's products as a result of seeing an influential media personality using similar products hence translating to commercial gain.

20. It is the Complainant's position that her right to privacy as provided under Article 31 of the Constitution was violated by the unlawful use of personal data through unlawful publication of her image/ photo without her consent.

21. The Complainant states that she sent a demand letter and reminder to the Respondent seeking their compliance in pulling down the post on its Facebook and Instagram account but the same was not heeded to.

22. The Complainant further stated that her employer, Royal Media services, has in place advertising guidelines and policies, that demand prior approval of advertisement outside the company, which guidelines are binding upon her and that by publishing her image/ photo, the Respondent led the Kenyan public, her followers and employer to construe the advertisement to construe the advertisement to the effect that; she had endorsed the Respondent's products, is one of the models offering modelling services to the Respondent to boost its sales, had contravened her employer's policy on advertising and that as the owner of the copyright, she had licensed, given consent and authorized the Respondent to use and exploit her copyright.
23. That the Respondent's conduct jeopardized her job as a television host and has suffered mental and psychological distress for the time the post remained on the Respondent's social media pages knowing that her career might end anytime if she was subjected to disciplinary proceedings due to the publications.
24. The Complainant averred that she filed a constitutional petition at the High Court Nairobi being *HCCHRPET/E457/2021 Hellen Muthoni -vs- Solpia Kenya Limited t/a Sistar Kenya* and *vide* judgment dated 21st September 2023, Hon. Justice A.C Mrima declined jurisdiction under the doctrine of exhaustion and directed parties to complain under the Data Protection Act.
25. The Complainant further stated that the impugned post that unlawfully used the Complainant's data through posting on Facebook and Instagram was pulled down on the morning of 16th December 2021 when the application for injunction was coming up for hearing in HCCHRPET/E457/2021.
26. The Complainant averred that her right to privacy was violated and her personal data used for commercial purposes without consent from 6th October 2020 to 16th December 2021.

II. RESPONDENT'S CASE

27. As stated above the Respondent through their Advocates on record responded to the allegations against it on 7th December 2023.
28. In their response, the Respondent stated that:

- (i) The Complainant in paragraph 7 of the Complaint states that on the 2nd day of October 2020, the Complainant took a photo with her phone and posted it on her social media platforms as a way of engaging with her followers and her supporters. To this, the Respondent averred that it is therefore clear from the above statement that the Complainant by her own volition took her image and posted on social media platform and therefore it is not true that the Respondent obtained and posted the complainant's image and likeness in its social media platforms as claimed;
- (ii) The Complainant used her own phone to take the images and at no time did the Respondent have access to or had custody of the Complainant's phone;
- (iii) The allegation that the Respondent used the said image and likeness to advertise its products is unsubstantiated. The images accompanying the complaint are the images posted by the complainant herself and that there is no advertisement enclosed to establish how the Respondent advertised their hair product as claimed;
- (iv) The Respondent did not in any way author the image and/or its likeness and definitely did not post the said image on social media and further did not prepare and post any advertisement using the said image and or its likeness;
- (v) The Respondent stated that from its investigations, it established that the Complainant went to one saloon that uses its products and one John Mwangi, a hair stylist used its product to style the Complainant;
- (vi) The Complainant upon being styled took a photo of herself as pleaded in paragraph 7 of the complaint and posted it on her account;
- (vii) The Complainant tagged several people including the said John Mwangi in his Instagram handle. The said Mwangi tagged the Respondent who was able to see the Complainant's photo and make brief comments on the artistic expression as captured by the paragraph. The Respondent stated that it could

not change anything posted in the primary photo as that is not allowable and therefore has no control access to the posted material at any time;

- (viii) The social media operating procedures do not allow a third party to edit or in any way interfere with original works as posted by the primary party. The Respondent stated that it only made the following comments at the comment part and re-posted the comments:-

**"<AFRO BULK TWIST> Crochet braid
Girls with natural hairstyles. We found a hair inspiration by
@hellen msoo in #afrobulktwist. A true fireball. #Repost @
hellen_msoo (with @report from insta)"**

- (ix) The above comments are a clear general admiration of the style and the artistic expression of the hair stylist who did a fantastic job in creating a true natural look of the Complainant and at no time was the complementary remarks meant to be advertisement and/or an implied expression of the Complainant as modelling the Respondent's products.
- (x) Their client did not in any way publish the image and likeness of the claimant as claimed in paragraph 11 of the Complaint as the words appearing therein were inputted on the comment section in accordance with the social media practice without any re-publishing of the image.
- (xi) The posts in social media have a like, comment, and follow section, and there is no requirement for consent for one to like, follow, and or comment as no other new image needs to be generated for that to happen. Therefore, the Respondent did not post any unlawful post and or use any of the complainant's data through posting as claimed by the Complainant.
- (xii) The Respondent has never been in possession of the Complainant's data and/or image and had no control of the same. That the Respondent having

been tagged became a follower of the Complainant and even boosted her numbers as far as following is concerned.

(xiii) The Respondent did not contravene the Data Protection Act provisions for the following reasons:-

- a) The Respondent was not the data controller or the data processor. That in this case, the image was taken by the Complainant using her own phone which she had absolute control and possession. The Complainant's act of posting and tagging other parties had the consequence of inviting following, generating likes and attracting comments both positive and negative. The Respondent stated, the fact that it gave a positive comment it did not in any way offend Section 25 of the Act.
- b) The Respondent stated that it did not collect the data in issue at all and the same was not in its custody or control either as a data controller or data processor. The fact that primary data was collected and stored in the data subject's phone made the data subject both the data controller and data processor. The act of posting that data in social media as the logical consequence and the controller and processor did not limit the extent of likes, following or comments. By tagging many people including John Mwangi, the Complainant was attracting following which would otherwise improve the Complainant's commercial appeal to potential clients.
- c) The Respondent stated that considering it did not have in its possession, custody, or control any data from the Complainant, it did not use the Complainant's data for commercial purposes. The Complainant used her phone to take her image which she posted on social media which is a public domain accessible to all social media users.
- d) The Respondent further stated that it has since ceased following the Complainant and therefore has no access to the social media pages of the Complainant and consequently, it will not in the future be able to follow, like, and or comment on the posts by the complainant.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

29. As part of his evidence, the Complainant adduced

- i) Copies of pleadings in High Court Nairobi HCCHRPET/E457/2021 Hellen Muthoni -vs- Solpia Kenya Limited t/a Sistar Kenya with supporting documents
- ii) Copy of judgment in High Court Nairobi HCCHRPET/E457/2021 Hellen Muthoni -vs- Solpia Kenya Limited t/a Sistar Kenya

II. THE RESPONDENT'S EVIDENCE

30. In addition to the response to the Complaint, the Respondent adduced a copy of judgment in High Court Nairobi HCCHRPET/E457/2021 Hellen Muthoni -vs- Solpia Kenya Limited t/a Sistar Kenya

F. ISSUES FOR DETERMINATION

31. 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 lawfully processed; and
- ii. Whether the Complainant is entitled to any remedy under the Act.

G. ANALYSIS AND DETERMINATION

I. WHETHER THE COMPLAINANT'S PERSONAL DATA WAS LAWFULLY PROCESSED

32. This Office notes from the onset that the complaint revolves around the use of social media and the operational characteristics thereof. The Complainant posted her photograph on social media. The photograph is personal data as it makes the Complainant identifiable. As such the Office shall address the question whether

the Complainant's personal data was lawfully processed by answering the following questions:-

- i) Was the Complainant's consent required from the onset for the Respondent to obtain the Complainant's personal data?
- ii) Was the Respondent a data controller and/ processor as alleged?
- iii) Were there aspects of advertisement and/or commercial use of personal data?

Was the Complainant's consent required from the onset for the Respondent to obtain the Complainant's personal data?

33. It is not in dispute that the Complainant, took a photograph of herself and posted it on her social media pages and platform, a public domain which is accessible to all social media users. This is a fact as confirmed by the Complainant herself. The uncontroverted fact that the Complainant took a photograph of herself and posted it on her social media platforms is therefore the genesis of this complaint.

34. Having established the genesis of the complaint, this Office will assess whether from the onset, the Complainant's consent was required for the Respondent to obtain her personal data from her social media..

35. Section 28 of the Act provides for collection of personal data. It provides

28. Collection of personal data

(1) A data controller or data processor shall collect personal data directly from the data subject

(2) Despite sub-section (1), personal data may be collected indirectly where-

(a) the data is contained in a public record;

(b) the data subject has deliberately made the data public;

(c)(emphasis ours).

36. With regards to the complaint at hand, as earlier stated the Complainant by her own volition took a photo of herself and deliberately posted it on public social

media platforms. She made public her photograph and appearance to a plurality of persons.

37. Consequently, by the Complainant making her photograph public through social media, any collection therefrom fell under Section 28(2)(b) of the Act above. As such, the Complainant's argument that her consent was not obtained before the Respondent obtained her personal data falls short to this extent. The Respondent did not have to obtain consent from the Complainant for the specific purpose of accessing and collecting the Complainant's photograph.

Was the Respondent a data controller and/or processor as alleged?

38. Section 2 of the Act defines a Data Controller as *a natural or legal person, public authority, agency, or other body which, alone or jointly with others, determines the purpose and means of processing of personal data.*

39. The same section further defines a data processor as *a natural or legal person, public authority, agency, or other body which processes personal data on behalf of the data controller.*

40. From the above definitions, it is evident that a data controller determines the usage of the data. It determines how, when, where, and what the data is to be used for.

41. The Respondent collected the Complainant's personal data lawfully as discussed above. Upon obtaining and having access to the Complainant's personal data, the Respondent was in a position to decide what to do with it. The Respondent had the option of deciding whether to like, comment, repost, not to like, not to comment, not to repost or even to ignore in the photograph in toto.

42. To this end, the Respondent became a data controller for any subsequent processing of the Complainant's personal data that deviated from the purpose which the Complainant posted her photograph online.

Were there aspects of advertisement and/or commercial use of personal data?

43. To this question, the Complainant alleges that by the Respondent commenting and reposting the comment on its social media platform as manifest from the evidence adduced to this Office it amounted to advertisement inform of online/internet marketing and commercial use of personal data.
44. In this regard, the Office observes that online/internet marketing is an art and science of selling products and services over the internet. It involves identifying marketing strategies that are appealing to the target audience and translating them into sales while science entails research and analysis essential to measure the success of those strategies. Some of the methods used by organizations for online/internet marketing include the use of social media platforms like Facebook, Instagram, and X (formerly Twitter) wherein the organizations have official social media accounts where their prospective buyers and members of the public visit and view what is being advertised. For example, as evident from the evidence adduced before this Office, it is evident that the Respondent organization/company has an account in such a platform (Facebook and Instagram) where it advertises its products.
45. By processing personal data for purposes of marketing products online, the organization then becomes data controller for that purpose. It determines what and how to market through posting, reposting, and or commenting, on its social media accounts. The Office has perused the Respondent's online posts adduced as evidence in this Complaint and it is clear that the Complainant's impugned photograph is not part of the Respondent's main posts.
46. From the evidence adduced to this Office the Respondent commented and reposted the Complainant's photograph post which she had publicly made available in her social media platforms. The Complainant tagged her hair stylist who purportedly then tagged the Respondent who was able to see the Complainant's photo and make brief comments thereon.

47. Section 37 of the Data Protection Act provides for commercial use of data. It provides:-

37. Commercial use of data

(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 authorized 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, anonymize the data in such a manner as to ensure that the data subject is no longer identifiable.

(3) The Cabinet Secretary, in consultation with the Data Commissioner may prescribe practice guidelines for commercial use of personal data in accordance with this Act.

48. Regulations 14 of the Data Protection (General) Regulations 2021 further provide for commercial use of personal data as follows:-

14. Interpretation of commercial purposes

(1) for the purposes of section 37 (1) of the Act, a data controller or processor 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. [Emphasis ours]

49. From a collective reading of the above legal provisions, it is discernible that any form of influencing and/or advancing a commercial transaction whether directly or indirectly using personal data amounts to the commercial use of personal data.

50. A sample of the comments made by the Respondents on the Complainant's photograph that they had reposted include –

"...thank you for getting in touch with us.....Please let us know your location and we shall direct you to the nearest distributor. Thank you for choosing SISTAR"

"XXXX XXXX Good day, please contact our major distributor <Bxxxxx Cosmetics – 07xxxxxxx3" Thank you for choosing SISTAR"

"Please contact our major distributor <Kxxxxx Cosmetics – 07xxxxxxx6" Thank you for choosing SISTAR"

51. The commercial use of personal data obtained by the data controller must be by consent from the data subject.
52. As discussed above, consent at collection and obtaining of the Complainant's personal data was not required as the Complainant had deliberately made her photograph public. However, any subsequent processing of the Complainant's personal data for commercial purposes required the consent of the Complainant.
53. While it is true, as averred by the Respondent, that the posts in social media have a like, comment, and follow section, and there is no requirement for consent for one to like, follow, and or comment as no other new image needs to be generated, for the Respondent to market its products and advance its commercial interests by inducing prospective customers to buy its product using the Complainant's images as illustrated above, they should have reached out to the Complainant and sought her consent.
54. By reposting and commenting the way it commented on the Complainant's post, the Respondent was advancing its commercial interests by inducing the members of the public to buy their product..
55. The inducement to buy the Respondent's product is apparent from the evidence adduced to this Office wherein members of the public started inquiring about the Respondent's product and the Respondent was confirming that indeed it was their

product. As demonstrated above, the Respondent went further and even made referrals and directed the members of the public to their distributors' and agents' places where they could buy the products. The referrals were made to different distributors in various parts of the country including Pipeline and Embakasi in Nairobi County and Malindi in Kilifi County.

56. By inducing the members of the public the way it did, the Respondent influenced commercial transactions both indirectly and directly.

57. As such, the actions of the Respondent amounted to internet marketing and commercialization of the Complainant's personal data, without the Complainant's consent.

58. The Office therefore finds that the use of the Complainant's personal data for commercial purposes was unlawful and contravened the Act.

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

59. 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.

60. Having considered the merits of the Complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent did not process the Complainant's personal data in accordance with the law, it, therefore, follows that there has been a violation of the Act by the Respondent.

61. 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.

62. Regulation 14 (3) (e) of the Enforcement Regulations further provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

63. The Complainant claimed for the remedy of compensation against the Respondent. The Respondent did not make any representations concerning the Complainant's claim and/or prayers for compensation. Having found that the Complainant made her personal data public and that the Respondent unlawfully used this personal data for commercial purposes, the Respondent is hereby directed to compensate the Complainant the amount of Kshs. **500,000/= (Five Hundred Thousand Shillings Only)**.

H. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for unlawfully processing the Complainant's personal data.
- ii. The Respondent is ordered to Compensate the Complainant **500,000/= (Five Hundred Thousand Shillings Only)** for the unlawful processing of the Complainant's personal data.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 6th day of January **2024**



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER