



**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 1992 OF 2023**

VICTORY OWINO.....COMPLAINANT

-VERSUS-

WANANCHI GROUP (K) 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 on 10th October 2023 alleging that the Respondent had been sending the Complainant promotional messages without her consent and refused to stop sending the said messages despite the Complainant requesting the Respondent to delete her details from the system.

B. LEGAL BASIS

2. Article 31 (c) and (d) of the Constitution of Kenya 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 premised 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 10th October 2023. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainant who was the aggrieved data subject.
7. The Respondent provides entertainment and connectivity through Zuku which is a brand operating under the Respondent.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 15th November 2023 referenced **ODPC/CONF/1/5 VOL 1 (561)**. In the notification of the complaint, the Respondent was informed that if the allegations by the Complainant were true, they were in violation of various Sections of the Act and the attendant Regulations. Further, the Respondent was asked to provide this Office with the following:
 - 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 mitigation adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint do not take place again; and

9. The Respondent responded to the notification of complaint letter *via* a letter dated 8th December, 2023.
10. This determination is pegged on the provisions of Regulation 14 of 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.

D. NATURE OF THE COMPLAINT

11. The Complainant stated that she subscribed to Zuku fibre ("Zuku") for purposes of accessing Wi-fi and that Zuku is a service provided by the Respondent. She alleged that when she subscribed to the service, she did not agree to receiving any promotional messages and she was not informed that her rights were hinged on the Zuku router installed in her house. She stopped using the service and the Respondent persisted on calling, emailing and sending her messages.
12. The Complainant alleged that she requested them via email to delete her details from the system, however, a year later she still received the messages and calls from Zuku.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

13. The Complainant alleged that despite requesting the Respondent to stop calling, sending her messages and emails, and delete her details from the system, the Respondent persisted on calling her and sending the said promotional messages.
14. The Complainant availed proof of the emails that she sent the Respondent requesting them to delete her details from their system. She also availed proof of the Respondent's response to her email advising her to return the equipment to one of their offices or share a day they can recover them.

15. The Complainant alleged that Zuku persistently sent her messages and called her to follow up on her account, asking her to resume services yet she did not agree to receive any marketing messages from the Respondent and therefore, the promotional messages sent to her was an infringement of her rights.
16. She stated that pegging her privacy rights on the router was an infringement of her rights because she was not made aware of this condition when she subscribed to her services.
17. The Complainant claimed that as at the date of the complaint, Zuku sent her at least 124 messages and called her countless times. They also sent her an email asking her to pay her monthly bill despite not having used her services for more than a year and communicating to them that she no longer wished to be their customer.
18. The Complainant sought several reliefs from this Office including:
- a. To find the Respondent liable for infringement of her data privacy rights;
 - b. To find that the Respondent did not comply with the principle of data privacy by design or default;
 - c. To find that the Respondent acted in contravention of the data protection principles under the Act;
 - d. To make an order barring the Respondent from calling and sending her marketing and promotional messages;
 - e. To make an order to the Respondent to submit information on the number of promotional calls and messages to her over the duration of the relationship;
 - f. An administrative fine against the Respondent for infringement of her rights and the principles under the Act;
 - g. Compensation of Kshs. 3,000,000 for the distress caused by the Respondent;
 - h. Compensation of Kshs. 2799 being the amount the Respondent sought to make every time they sent the promotional messages; and
 - i. Any other orders the Data Commissioner deems appropriate.

ii. THE RESPONDENT'S RESPONSE

19. The Respondent was sent a notification on the 15th of November 2023 and responded vide a letter dated 8th December 2023.
20. The Respondent stated that their terms and conditions for provision of their services acts as the contract between their customers and themselves. The said terms provides that the customer premise equipment remains their property and that upon termination of services, they shall recover the same.
21. The Respondent stated that recovery is normally effected by either the customer returning the equipment to the company or the customer informing the company of the collection point.
22. The Respondent stated that upon receiving the request to delete the data, the Complainant was informed in an email that for the company to effect account closure, she was to return the equipment to any of their offices or inform the of a day when the same could be recovered from her premises.
23. The Respondent alleged that there was no further communication from the Complainant and therefore, they were unable to proceed with the request to delete her data.
24. The Respondent claimed to have a lawful basis to continue holding the Complainant's information until and unless they return or advise as to how the equipment can be recovered.
25. The Respondent indicated that the Complainant was cognisant of the contractual obligation bestowed upon her and that she should not attempt to circumvent the same to their detriment.
26. The Respondent stated that they have taken measures to archive the data associated with the Complainant, however, they will still retain the data as they pursue recovery of the equipment issued to her.

F. ISSUES FOR DETERMINATION

27. In light of the above, 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

28. Section 40 (1) (b) of the Act provides for the right of rectification and erasure and states that a data subject may request a data controller or data processor to erase **without undue delay** personal data that the data controller or processor is no longer authorised to retain.

29. Further, Regulation 12 (1) (b) of the Data Protection (General) Regulations, 2021 (the 'General' Regulations) provides that pursuant to Section 40 (1) (b) a data subject may, request a data controller or processor to erase or destroy personal data held by the data controller or processor where the data subject withdraws their consent that was the lawful basis for retaining the personal data.

30. Section 32 (2) of the Act provides for the conditions of consent and states that a data controller or processor shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data. Further, subsection 2 provides that unless otherwise provided under the Act, a data subject shall have the right to withdraw consent at any time.

31. In this complaint, the Complainant no longer wanted her personal details to be in possession of the Respondent because she was no longer using their services. She exercised her right of erasure under the Act and the Regulations which the Respondent did not honour thereby violating her rights under the Act.

32. The Complainant had the right to withdraw consent and requested the Respondent to delete her personal details from their system. The Respondent refused to delete her details citing their terms and conditions as a lawful basis for retaining her personal details.

33. However, the Respondent did not discharge the burden of proof that they had a lawful basis for retaining the Complainant's details despite her no longer being their customer and requesting the deletion of her details from their system.

34. This Office therefore finds that the Respondent violated the Complainant's rights to erasure as stipulated under the Act.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

35. Section 25 (a) of the Act provides that every data controller or processor shall ensure that personal data is processed in accordance with the right to privacy of the data subject.

36. Further, Section 39 of the Act provides for limitation to retention of personal data. It states that a data controller or processor shall retain personal data only as long as may be reasonably necessary to satisfy the purpose for which it is processed unless retention is, among others, reasonably necessary for a lawful purpose or authorised or consented by the data subject. Further, subsection 2 provides that the controller or processor shall delete, erase, anonymise or pseudonymise personal data not necessary to be retained in a manner as may be specified at the expiry of the retention period.

37. Regulation 19 (2) (b) of the General Regulation gives effect to the above provision and states that a data controller or processor shall erase, delete, anonymise or pseudonymise personal data upon lapse of the purpose for which the personal data was collected.

Owing to the above provisions, once the Complainant ceased to be the Respondent's customer, the purpose of retaining her personal data also ceased.

38. The Respondent provided its terms and conditions as evidence of having a lawful basis for the retention of the Complainant's personal details. Interestingly, the terms provided for termination of the Agreement (the terms and conditions). Clause 2 (5) of the terms provide that:

"Wananchi will terminate this Agreement and deactivate the Service at any time without providing notice to the Customer if the Customer fails to make payment when it is due; and it remains unpaid for a period of ninety (90) days."

39. The Complainant ceased to be their customer and informed them of the same. She did not make payment for a period of more than ninety (90) days which should have prompted the Respondent to deactivate the services to her. Instead, they retained her personal details and continued to market their services by calling, sending her numerous messages and emails.

40. Section 41 of the Act provides for data protection by design or by default and states that every data controller or processor shall implement appropriate technical and organisational 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.

The Respondent, by indicating that the rights of the Complainant were pegged on her still having their router in her possession, despite ceasing to be their customer indicates that they have not implemented the measures contemplated in Section 41 of the Act.

41. This Office therefore finds that the Respondent did not fulfil its obligations mandated upon them by the above provisions of the Act and the Regulations.

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

42. 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. The Complainant requested for several orders from this Office as indicated in paragraph 18.

43. Having found the Respondent liable for violation of the Complainant's rights under the Act, she is entitled to compensation under Section 65 of the Act which 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.

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

44. In view of the foregoing, the Respondent is hereby ordered to compensate the Complainant **Kshs. 250,000 (Two Hundred and Fifty Thousand Shillings Only)** for failure to delete her personal details from their system and persistently calling and sending her marketing and promotional messages without her consent after she ceased being their customer.

45. The Complainant did not quantify or provided proof to warrant a compensation order of Kshs. Three million (3,000,000) and therefore this Office denies making such order. Similarly, the order for compensation of Kshs. 2799 for every message and call is also denied.

46. Having found that the Respondent did not fulfil its obligations under the Act, an Enforcement Notice shall be issued against it.

47. The Respondent ought to cease and desist calling and sending promotional messages and emails to the Complainant and any other data subject that has stopped using its services failure to which administrative fines shall be issued against it. The Respondent is under an obligation to limit the retention period of personal data that they collect and store especially where the data subject has exercised their right of deletion and erasure.

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for infringement of the Complainant's rights and violation of its obligations under the Act;
- ii. The Respondent is hereby ordered to compensate the Complainant Kshs. **250,000 (Two Hundred and Fifty Thousand only);**
- iii. An Enforcement Notice shall be issued against the Respondent; and
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 7th day of January 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**