



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0730 OF 2024

NANCY MUGO.....COMPLAINANT

-VERSUS-

MIGUEL VENTURES LIMITED.....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 25th May 2024 against the Respondent alleging that the Respondent posted the Complainant's image on its social media pages without her consent and upon request to pull down the said image, the Respondent failed to pull down the image.

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 9th October 2023 and rendered a determination dated 6th January 2024.
7. The Respondent, being dissatisfied with the decision of the Data Commissioner, lodged a judicial review application at the High Court Judicial Review Division, Case Number, HCJR/E027/2024.
8. Judgement of the said application was delivered on 16th May 2024 and an order was made in the following terms –
 - a. An order of Certiorari quashing the proceedings in ODPC Complaint No. 1981 of 2023 and the consequential determination and/or decision dated 6th January 2024 in so far as it applies to the *ex parte* Applicant.
 - b. An order of Prohibition prohibiting and/or restraining the Respondent and the Interested Party and/or anyone claiming under or through their authority including their officers, servant's agent or anyone howsoever from enforcing the Respondent's determination dated 6th January 2024.
 - c. An order of Mandamus compelling the Respondent to conduct a fresh hearing and determination of the complaint against the *ex-parte*

Applicant and in strict observation of the Constitution and the law before making a determination.

- d. The rehearing shall be completed within 45 days of the date of judgment.
- e. Costs to the Applicant.

9. Pursuant to the High Court's decision, the Complainant lodged a fresh complaint dated 25th May 2024 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').

10. As per Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *via* a letter dated 30th May, 2024 referenced **ODPC/CONF/1/5 VOL 1 (986)**. 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 lawful basis relied upon to process the Complainant's personal data;
- d. Whether the Complainant consented to the use of her personal data on their advertisement;
- e. The contractual agreement between themselves and the Complainant, if any;
- f. The lawful basis relied upon to deny the Complainant her right of erasure;
- g. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant;
- h. The mitigation measures adopted or being adopted to ensure such occurrence mentioned in the complaint does not take place again;
- i. Any other information they wish the Office to consider.

11. The Respondent was served with an advance copy of the letter electronically through their last known email address on 31st May 2024 and a physical copy

delivered to their offices on even date. The physical letter was received and signed by a representative of the Respondent.

12. It is noteworthy that the Respondent was given twenty-one days to respond to the notification of complaint pursuant to Regulation 11 (1) of the Enforcement Regulations in line with the principles of natural justice, fair administrative actions and the right to be heard.

13. The Respondent served its response to this Office through a letter dated 18th June 2024 *vide* an email on 20th June 2024.

14. This determination is therefore pegged on the provisions of 14 of the Regulations which state 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

15. The Complainant alleged that the Respondent contravened her data protection rights by failing to inform her of the intended use of her personal data and using her images for commercial publicity, particularly, advertisement of their services.

16. She alleged that the Respondent used her image for advertisement on the Respondent's social media platforms and they failed to erase her photo from the said platforms upon request.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

17. The Complainant provided screenshots of her images having been posted on the Respondent's social media site in April 2023. She stated that she tried to contact the Respondent to pull down her images to no avail.

18. The Complainant also adduced evidence of her photograph being proof that she was the one who was posted on the Respondent's social media site.

ii. THE RESPONDENT'S RESPONSE

19. The Respondent responded to the notification of complaint *vide* a letter dated 18th June 2024 and stated as follows;
20. That on or about August 2022, the Complainant approached them to advise her on how to obtain a VISA and other travelling documents to Canada which they accepted within the agreed terms of engagement. The Complainant then accepted to take a photo with their team which she requested be shared with her, which they allegedly did. The said photos are the subject matter of this complaint.
21. As part of their practice with customers, they post a few details with their clients after express verbal consent on their Whatsapp mobile number which disappear after 24 hours.
22. They then shared the Complainant's flight ticket on 17th September 2023, after she verbally agreed, on their Whatsapp status. It was on this day that she requested them to delete her details from their records which they did by deleting all her details from their records.
23. The allegations that they posted her on other social media platforms were untrue and that they are fully aware of the Act and the strict requirements to protect people's privacy not to use their images without their express consent. The photos and images filed with the complaint are therefore foreign to them as they have never shared the details on any of their social media platforms as alleged.
24. They denied the allegation that they refused to erase the Complainant's details from their social media platforms there being no reason why they would refuse to erase her details if at all they had shared them yet they understand that such would constitute a violation of the law and her right to privacy.
25. They further stated that the Complainant was not truthful in her complaint and that she had never raised her concerns with any other authority. Sometime in February 2024, she approached the Directorate of Criminal Investigations (DCI)

where she complained that they obtained money by false pretence and the Respondent's Director was summoned by the DCI to explain the issue.

26. That the Complainant's concern is not a violation of her privacy as alleged. She is attempting to use this Office to recover the deposit sum she paid to process her VISA which they did but she refused to travel on her own volition and contrary to their terms of engagement.

27. There was nothing to indicate that the photos filed in this complaint were posted on their social media handles at all and if that were true, there would be a time stamp indicating when the posting was done and on which platform.

28. That this Office dismiss the complaint for lack of material evidence to support it.

F. INVESTIGATIONS UNDERTAKEN

29. Owing to the mandate of this Office to receive and investigate any complaint by any person on infringements of the rights under the Act and the powers conferred upon this Office under Section 9 (1) (a) of the Act to conduct investigations on the basis of a complaint made by a data subject, it was imperative to log on to the Respondent's social media platforms to find out whether indeed the Complainant's images were posted by the Respondent.

30. Upon browsing the Facebook platform, this Office found that the Respondent had on 9th April 2023 posted the Complainant's images on their page. The five posts contained the Complainant's images as she alleged in her complaint. The Office took screenshots of the Facebook post, which is still available, for the avoidance of doubt that indeed the Respondent posted the Complainant's image.

31. The Respondent's Facebook page has 12,000 followers and the post containing the Complainant's image attracted 51 likes and 13 comments.

32. It is noteworthy that the said post is still up on the Respondent's page as at the date of this determination and therefore the averment that there was nothing to indicate that the photos filed in this complaint were posted on their social media platforms is false.

G. ISSUES FOR DETERMINATION

33. Following the evidence provided by both parties and the investigations conducted by this Office, the following issues fall for determination by this Office:

- i. Whether there was an infringement of the Complainant's rights under the Act; and
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THERE WAS AN INFRINGEMENT OF THE COMPLAINANT'S RIGHTS UNDER THE ACT

34. The Complainant is a data subject within the definition of the Act has rights under Sections 26 (a) and (e) of the Act to be informed of the use to which her personal data was to be put and to deletion of false or misleading data about her.

35. Section 40 (1) (b) of the Act also 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.

36. Further, Regulation 12 (1) (a) and (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;

a) the personal data is no longer necessary for the purpose which it was collected; and

b) where the data subject withdraws their consent that was the lawful basis for retaining the personal data.

37. The Complainant stated that she requested the Respondent to pull down her images from their social media pages to no avail thereby infringing on her rights under the above provisions.
38. While it is common knowledge that Whatsapp status disappear after 24 hours, the Respondent's post on their Facebook page was still up as at the date of this complaint and is still online as at the date of this determination.
39. Section 32 (1) of the Act provides for the conditions of consent and states that a data controller or data processor **shall** bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose.
40. The Respondent stated that it obtained oral consent from the Complainant to post her image and details of her flight details on their Whatsapp status. The status as indicated above disappears after 24 hours. However, they did not prove that she consented to her photo being posted on their Facebook page and continues to be posted to date.
41. Sub-section (2) of Section 32 of the Act states that unless otherwise provided in the Act, a data subject **shall** have the right to withdraw consent at any time.
42. In this complaint, the Complainant no longer wanted her image to be posted on the Respondent's social media page and therefore exercised her right and requested the Respondent to pull down the said image.
43. The Respondent did not prove that they initially had consent to use the Complainant's image on their Facebook page and they refused and/or neglected to pull down the Complainant's image. The aspect of undue delay was also not adhered to by the Respondent.
44. It is noteworthy that as at the date of this determination, the Respondent has still not pulled down the Complainant's image from its social media page therefore clocking over a year of infringing on the Complainant's rights under the Act and the attendant Regulations.
45. Further, Section 37 (1) (a) of the Act provides for commercial use of data and provides that a person **shall not** use, for commercial purposes, personal data

obtained pursuant to the provisions of this Act **unless** the person has sought and obtained **express consent** from a data subject.

46. The Respondent failed to prove that it sought and obtained express consent from the Complainant to publish her image on its Facebook page after the Complainant requested the Respondent to delete the posts containing her images from the said pages.

47. Interpretation of commercial purposes is provided for under Regulation 14 of the General Regulations which states that:

For the purposes of Section 37 (1) of the Act, a data controller or data 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.

48. The Respondent posted five (5) posts on their social media pages containing the Complainant's image advertising their services on 9th April 2023 and despite the first complaint being lodged, an appeal at the High Court of Kenya and a second complaint being lodged pursuant to the judgement of that appeal, the social media post is still displayed on the Respondent's page as at the date of this determination.

49. In one of the Respondent's posts on their Facebook page, they indicate:

"Service consultants for: Canada visa, UK visa, Germany visa, immigration information and student visa."

50. This post fits into the interpretation of the use of personal data for commercial purposes.

51. The Respondent is aware that the post is still up on its page and continues to infringe on the rights of the Complainant.

52. This Office therefore finds that the Complainant's rights under Sections 26 (a) (e), 32, 40 (1) (b) as read with Regulation 12 (a) and (b) of the General Regulations and Section 37 of the Act as read with Regulation 14 of the General Regulations were infringed by the Respondent.

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

53. Pursuant to Regulation 14 (2) of the Enforcement Regulations, a determination shall state the remedy to which the Complainant is entitled.

54. Further, the remedies are provided for in Regulation 14 (3) of the Enforcement Regulations which include:

- a. Issuance of an enforcement notice to the respondent in accordance with the Act and the Regulations;*
- b. Issuance of a penalty notice imposing an administrative fine where a respondent fails to comply with the enforcement notice;*
- c. Dismissal of the complaint where it lacks merit;*
- d. Recommendation for prosecution;*
- e. Or an order for compensation to the data subject by the respondent.*

55. 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.

56. Regulation 14 (3) (e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent. For the avoidance of doubt, it is imperative to note that compensation to the data subject is a separate remedy from issuance of a penalty notice imposing an administrative fine which is pursuant to Section 62 of the Act.

57. In view of the foregoing, this Office concludes and finds that the Complainant is entitled to compensation pursuant to Section 65 of the Act and Regulation 14 (3) (e).

58. In considering the Complainant's rights infringed by the Respondent, the commercial use of her image on their social media pages without express consent for more than one year, a continuous breach of unlawfully processing of the Complainant's image as at the date of this determination, the Respondent is hereby ordered to compensate the Complainant **KES 1,200,000 (One million, two hundred thousand shillings only)**.

59. Further, pursuant to Regulation 14 (2) (e) of the Enforcement Regulations, the Complainant is directed to delete the Complainant's image from its Facebook page and any other social media pages where it has been used for commercial purposes.

H. FINAL DETERMINATION

60. 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 her consent and failing to pull down the said image upon the Complainant's request hence violating her rights under the Act;
- ii. The Respondent is ordered to compensate the Complainant **KES 1,200,000 (One million, two hundred thousand shillings only)**.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this **28th** day of **June**, 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER