



## OFFICE OF THE DATA PROTECTION COMMISSIONER

### ODPC COMPLAINT NO. 1324 OF 2025

EDWIN MAKIO KANU.....COMPLAINANT

-VERSUS-

ALLEYWAYS BEER GARDEN LIMITED.....RESPONDENT

#### DETERMINATION

*(Pursuant to Section 8 (1) (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 complaint concerns the allegation that the Respondent has been using the Complainant's image on its social media without express consent or any other lawful basis thereof.

#### 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 (1) (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 10<sup>th</sup> September 2025. 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. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 15<sup>th</sup> September 2025 referenced ODPC/CIE/CON/2/1(653). 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. Further, among other things, the Respondent was asked to provide this Office with the following:
  - a) A response to the allegations made against them by the Complainant;
  - b) A contact person who can provide further details;
  - c) How they obtained the Complainant's personal data;
  - d) Duly signed contract/agreement with the Complainant if any;
  - e) Proof of consent from the Complainant for using his image for marketing purposes
  - f) Relevant material /evidence in support of the statement of response

- g) Detailed procedure of how data subjects exercise their data protection rights
- h) Data protection policy
- i) Mitigation measures
- j) Any other information relevant to the complaint.

8. The Respondent failed, refused and/or neglected to respond to the notification of complaint, and consequently, the allegations made against it stand uncontested.

#### **D. NATURE OF THE COMPLAINT**

9. The Complainant alleged that the Respondent published and utilized his image on its social media platforms without his knowledge, consent, or any lawful justification.

#### **E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED**

##### **i. THE COMPLAINANTS' CASE**

10. The Complainant alleges that on 24<sup>th</sup> July 2025, he visited the Respondent's premises and made several payments via Mpesa.

11. The Complainant further states that later that same day, at 15:41 hours, the Respondent, through its official Facebook page, published images of the Complainant without his knowledge, consent, or authorization.

12. He asserts that the Complainant's images have since been circulated across social media platforms, particularly on Facebook, and widely shared.

13. The Complainant contends that the Respondent's actions have caused him significant distress, embarrassment, and a sense of violation of his privacy. Being a family man and a Busia County Assembly employee of good repute, these actions have demeaned his human dignity.

14. The Complainant further asserts that, being publicly accessible, the image has exposed him to unwarranted scrutiny and has been utilized for commercial benefit without any form of compensation or acknowledgment.

15. He pleads that his image and likeness were clearly identifiable by the general public and were used in the Respondent's marketing campaign for sales and promotion, constituting commercial exploitation without his consent.

16. Finally, the Complainant states that on 28<sup>th</sup> July 2025, through his then advocate, he wrote a demand letter to the Respondent regarding the alleged infringement.

## **ii. THE RESPONDENT'S RESPONSE**

17. The Respondent remained unresponsive and did not respond to the notification of the complaint dated 15<sup>th</sup> September 2025.

## **F. INVESTIGATIONS UNDERTAKEN**

18. The Office conducted a site visit on the Respondent's premises during which the Respondent stated that consent had been obtained orally from the Complainant. The managing director further indicated that the images in question were removed once the Respondent was notified of the complaint.

19. During the course of the investigation, the Respondent was advised to provide supporting evidence of the alleged consent, as well as a formal response to the notification issued by the Office.

20. Despite these advisories, the Respondent is still unresponsive.

## **G. ISSUES FOR DETERMINATION**

21. It is undisputed that the Respondent used the Complainant's image on its Facebook platform.

22. In light of the above, the complaint, the evidence adduced together with the investigations conducted, the following issues fall for determination by this Office:

- i. Whether the Respondent obtained express consent from the Complainant to process their personal data for commercial purposes;
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

## **I. WHETHER THE RESPONDENT OBTAINED EXPRESS CONSENT FROM THE COMPLAINANT TO PROCESS THEIR PERSONAL DATA FOR COMMERCIAL PURPOSES**

23. Pursuant to Section 2 of the Act personal data means any information relating to an identified or identifiable natural person. The Complainant's face and likeness are clearly identifiable. Thus, the first threshold requirement is satisfied.

24. Additionally, section 2 of the Act further defines consent as any manifestation of express, unequivocal, free, specific, and informed indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data.

25. The definition of the Act details the minimum criteria of or for consent to be that it must be certain that the individual has consented, and what they have consented to. There must be a clear signal that they agree or have agreed to the processing. The unambiguity of the consent further links in with the requirement that consent must be verifiable to the extent that one must be able to demonstrate that the data subject consented to the processing.

26. It is therefore apparent that valid consent is a product of conscious decision-making and requires affirmative action. It should be demonstrable and capable of being proven.

27. Section 30 (1) (a) of the Act provides that a data controller or data processor shall not process personal data unless the data subject consents to the processing for one or more specified purposes.

28. The Act goes further to state the conditions of consent. It states as follows concerning the conditions of consent: -

### *32. Conditions of consent*

(1) *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.*

(2) *Unless otherwise provided under this Act, a data subject shall have the right to withdraw consent at any time.*

*(3) the withdrawal of consent under sub-section(2) shall not affect the lawfulness of processing based on prior consent before its withdrawal.*

*(4) In determining whether consent was freely given, account shall be taken of whether, among others, the performance of a contract, including the provision of a service, is conditional on the consent of the processing of personal data that is not necessary for the performance of that contract. (emphasis ours)*

29. Section 37 (1) of the Act provides for commercial use of data and states, "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 the data subject or 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."

30. Regulation 14 (1) of the Data Protection (General) Regulations 2021 further elaborates Section 37 of the Act 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.*

31. It is undisputed that the Respondent used the Complainant's image on its Facebook page to advertise, promote and market its services. Consequently, the Complainant's image was used to further the Respondent's commercial and economic interests. The use of the Complainant's image, visible to the general public visiting the Respondent's Facebook page, was intended to induce potential clients, whether directly or indirectly, to use the Respondent's services. This use of the Complainant's image for commercial purposes required explicit consent.

32. It is trite that where consent has been obtained orally, the same must be reduced into writing or recorded electronically, and a record of the script thereof be kept. That way,

the consent can be proven by the Respondent as the burden of proof establishing a data subject's consent to the processing of all or part their personal data and for a specified purpose. That said, the Respondent has not demonstrated that they obtained explicit consent from the Complainant prior to using his personal data for purposes beyond those originally stated at the time of collection.

33. This Office therefore finds that as far as issue no **(i)** is concerned, the Respondent did not obtain the requisite consent required by the Act to use the Complainant's image for commercial purposes.

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

34. According 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.

35. Having considered the merits of the complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent unlawfully processed the Complainant's personal data without express consent, it therefore, follows that there has been a violation of the Act by the Respondent.

36. 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.

37. 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.

38. The Complainant prayed for compensation for the violation incurred.

39. The Respondent is hereby directed to compensate the Complainant in the sum of **Kenya Shillings Five Hundred Thousand Only (Kshs. 500,000/=)**. In arriving at this award, this Office has taken into account the nature and extent of the violation,

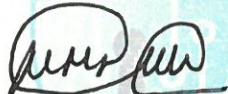
the harm occasioned to the Complainant, and the need to uphold the accountability under the Act.

#### **H. FINAL DETERMINATION**

40. In the ultimate, the Data Commissioner makes the following final determination;

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

DATED at NAIROBI this 9<sup>th</sup> day of December 2025



**IMMACULATE KASSAIT, MBS**

**DATA COMMISSIONER**

**KENYA**