



## OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1289 OF 2025

**ALEXANDER MWENDIA.....COMPLAINANT**

**-VERSUS-**

**HELLO TRACTOR KENYA 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 Office received a complaint against the Respondent alleging that the Respondent used the Complainant's images for promotional purposes and commercial gain without the Complainant's knowledge/ consent.

#### **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 1<sup>st</sup> September 2025. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaints filed against it *vide* letter dated 16<sup>th</sup> September 2025. The notification letters were referenced ODPC/CIE/CON/2/1 (362). The Office in the said Notification of Complaint for the complaints requested the Respondent to furnish the Office with –
  - a) A response to the allegations made against it by the Complainant;
  - b) A contact person who can provide further details as regards the complaint;
  - c) Any relevant materials or evidence in support of its response above, including but not limited to consent forms, agreements or communications with the Complainants ( if any);
  - d) Details of the measures in place at the time of the alleged use to ensure the lawful processing of personal data, particularly in marketing and advertising materials;



- e) An explanation as to whether the Complainant was informed of the intended use of his image and whether express consent was obtained prior to their use in any promotional or commercial materials;
  - f) The lawful basis relied upon for the collection, storage, and public dissemination of the Complainants' image for commercial purposes;
  - g) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant; and
  - h) Any other information it wished the Office to consider.
8. In the interest of fair justice, and pursuant to Regulation 11 of the Data Protection (Complaints Handling Procedures and Enforcement) Regulations, 2021, the Office further informed the Respondent of the options of -
- a. Reviewing the complaint and summarily resolving the same to the satisfaction of the Complainant, or
  - b. Resolving the complaint through mediation, negotiation and/or conciliation, as the alternative dispute resolution (ADR) mechanisms provided for by the Act and the Regulations.
9. The Respondent responded to the notification letter vide a letter dated 6<sup>th</sup> October 2025.

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

10. The Complaint concerns the Complainant's allegations that the Respondent used his image on a promotional roll-up banner displayed between 23<sup>rd</sup> and 29<sup>th</sup> September 2024 during the Nairobi International Trade Fair at Jamhuri Park.

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

##### **i. THE COMPLAINANT'S CASE**

11. The Complainant states that he filed Complaint No. ODPC/COMP/0816/2025 against Hello Tractor, following the Office's earlier decision to decline admission on the grounds that the issues raised mirrored those addressed in Complaint No. ODPC/COMP/0535/2025 filed against AGRA, which had been resolved through Alternative Dispute Resolution (ADR).

rk

12. The Complainant, through his advocates, contends that the data processing activities undertaken by Hello Tractor were conducted independently and differently from those of AGRA. He asserts that Hello Tractor processed his personal data, specifically his image, without consent, by using it on a promotional roll-up banner bearing the name Agra who obtained third party services from them.
13. The Complainant avers that Hello Tractor sourced his image, designed the content, and displayed it without obtaining valid consent, contrary to Sections 25 and 32 of the Data Protection Act, 2019. He further argues that AGRA had denied any Data Controller or Data Subject relationship with him, and that Hello Tractor had not provided any evidence of a valid contractual or consent arrangement authorizing the processing of his personal data.
14. To support his Complainant, the complainant adduced:-
- i. A picture of the roll-up banner used by Agra.
  - ii. Response letter from Agra Complaint No. ODPC/COMP/0535/2025.
15. As to the Respondent's contentions in its response, the Complainant contended that the Respondent's assertion that the matter was settled by AGRA is misleading, as the complaint before the Office concerns the Respondent's own role in the collection and sharing of the Complainant's image, for which no evidence of resolution has been provided.
16. The Complainant stated that the Respondent collected and shared his image without consent, thereby initiating the unlawful processing which later led to the use complained of.
17. He averred that the Respondent has not produced any evidence showing that the Complainant granted permission for his image to be used or shared with AGRA.
18. Additionally, the Complainant stated that the Respondent cannot shift responsibility to AGRA, as the processing originated from its own actions and communications.

*ms*



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

19. The Respondent stated that, upon conducting an internal review its findings did not reveal any liability on its part, as it was its understanding that the claim had been fully settled by AGRA, who had taken responsibility for the use of the Complainant's image.

20. The Respondent asserted that at no point did Hello Tractor share the image with AGRA for purposes of commercialization or publication, and that any communication between the parties was solely intended for internal or household use between partners.

21. The Respondent further stated that the events referenced in the complaint arose from a single series of related occurrences which, to its understanding, had been conclusively addressed through the earlier settlement between the Complainant and AGRA. It therefore considered the present complaint an attempt at unjust enrichment by the Complainant.

## **H. ISSUES FOR DETERMINATION**

22. The following issues therefore fall for determination by this Office:

- i. Whether the Respondent obtained express consent from the Complainant to process his personal data; and
- ii. Whether the Complainant is entitled to any remedies under the Act.

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

23. It was the Complainant's position that the Respondent illegally and unlawfully used and processed his personal data without consent for promotional purposes and commercial gain.

24. It was the Respondent's position that in as much as it processed the Complainant's image, it shared the image with AGRA for internal use between the Respondent and AGRA.

*NS*



25. This Office has perused the letter from AGRA's legal representatives which was submitted as part of the Complainant's evidence. From the correspondence, AGRA distances itself from the Respondent's position. AGRA states that it had retained the promotional services of the Respondent for the Nairobi International Trade Fair 2024. AGRA states that in the processing of the Complainant's image, the Respondent was the data controller and it was the responsibility of the Respondent to ensure that the Complainant's image was processed in accordance with the Act.
26. From the evidence, AGRA further stated that the Respondent was the one that created and disseminated the image in question on the roll-up banner. To AGRA, the Respondent is fully responsible to the processing of the Complainant's image and the only involvement it has with respect to the subject banner is that its logo appears on the banner.
27. The Respondent did not adduce any evidence to rebut what AGRA had stated in their letter. As such the responsibility of processing the Complainant's image on the promotional banner rests with the Respondent herein.
28. 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.
29. The Act goes further to state the conditions of consent. It states as follows with regard to 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*

*K/*



*a service, is conditional on the consent of the processing of personal data that is not necessary for the performance of that contract.*

30. Additionally, Regulation 4 of the Data Protection (General) Regulations, 2021 stipulates that the processing of personal data must be based on consent in accordance with Section 32 of the Act. When seeking consent prior to processing, the data controller or data processor must inform the data subject of the following:

- i. The purpose of each processing operation for which consent is sought;
- ii. The type of personal data that will be collected and used;
- iii. The right to withdraw consent; and
- iv. The implications of providing, withholding, or withdrawing consent.

31. Regulation 4(3) specifies that when obtaining consent from a data subject, the data controller or data processor must ensure that the data subject voluntarily gives consent and that the consent is specific to the purpose of processing.

32. From the above provisions of law, the burden of proof for consents lies on the Respondent. The Office observes that although the Respondent stated the circumstances within which the photograph was taken, it did not discharge its burden of proof as envisaged under Section 32 (1) of the Act.

33. On the issue of commercial use of personal data, the Act provides under Section 37 (1) (a) 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.

34. Regulation 14 (1) of the General Regulations provides the interpretation of 'commercial purposes' and provides 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.

*rkf*



35. By using the Complainant's image in its promotional banner at the Nairobi International Trade Fair 2024 the Respondent was advancing its commercial interests. The promotional banner was inducing the members of the public participating in the trade fair to be their clients/ customers in one way or the other as envisaged above.

36. This Office, therefore, finds with respect to issue no. (i) that the Respondent did not obtain the Complainant's express consent to process their personal data for commercial gain.

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

37. Under 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.

38. Having considered the merits of the Complaint, the evidence adduced by the Complainant and the Respondent, and having found that the Respondent processed the Complainant's personal data without consent, it therefore, follows that there has been a violation of the Act by the Respondent to that extent. The Respondent did not process the Complainant's personal data in accordance with Sections 30 (1) (a) and 32 (1) of the Act.

39. 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.

40. 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.

*nk*



41. The Complainant claimed compensation as a remedy against the Respondent. In its Response to this prayer, the Respondent termed this as an attempt at unjust enrichment.

42. Having found that the Respondent processed the Complainant's personal data without obtaining their consent, the Respondent is hereby directed to compensate the Complainant the amount of **KES 500,000/= (Five Hundred Thousand Shillings Only)** for processing of the Complainant's personal data for commercial purposes without their express consent

**I. FINAL DETERMINATION**

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

- i. The Respondent is hereby found liable for use of the Complainant's personal data for commercial purposes without express consent.
- ii. The Respondent is hereby ordered to compensate the Complainant **KES 500,000 (Five Hundred Thousand Kenya 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 27<sup>th</sup> day of October 2025.



**IMMACULATE KASSAIT, MBS**  
**DATA COMMISSIONER**

