



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1331 OF 2025

BRIAN ANYONA MOGOI **COMPLAINANT**

-VERSUS-

MATCH VENTURES LTD **RESPONDENT**

DETERMINATION

Under 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 Complainant filed a complaint against the Respondent alleging that the Respondent unlawfully used his image in advertising flyers for a land-selling business without his knowledge nor 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 as '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 (hereinafter as '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 11th September 2025. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by the Complainant, who was an 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 30th September 2025 and referenced ODPC/CIE /CON/2 / 1 (674). In the Notification of the Complaint, the Respondent was informed that if the allegations by the Complainant were true, it was in violation of various provisions of the Act. Further, the Respondent was asked to provide this Office with the following: -
 - a. A response to the allegations made against it by the Complainant;
 - b. A contact person who can provide further details as regards this Complaint.
 - c. Any relevant materials or evidence in support of your response above.
- d. The lawful basis relied upon in using the Complainant's image for commercial advertisement.



- e. An elaborate representation of how data subjects can exercise their rights in relation to data protection.
- f. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant and the mitigation measures adopted or being adopted to ensure that such occurrences mentioned in the Complaint do not take place again, if any
- g. Any other information you wish the Office to Consider

8. The Respondent responded to the Notification of Complaint letter *vide* a letter dated 24th October 2025.
9. This determination is therefore a result of analysis of the complaint as received, the response by the Respondent and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

10. The Complainant alleges that the Respondent unlawfully used his image in advertising flyers for a land-selling business without his knowledge or consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant avers that the Respondent unlawfully used his image in advertising flyers for a land-selling business, thereby violating his constitutional rights to dignity, privacy, and protection of property as guaranteed under Articles 28, 31, and 40 of the Constitution of Kenya, 2010.
12. The Complainant further submits that the Respondent processed his personal data specifically his image without seeking or obtaining his consent, contrary to Sections 25, 26, and 30 of the Data Protection Act.
13. He purports that the Respondent photographed him during a shamba site visit in Mangu, Nakuru County, in April 2025 without his knowledge, and notes that this initial act amounted to unlawful collection of personal data.
14. The Complainant avers that he only discovered in May 2025 that the Respondent had subsequently used his image in advertising flyers for its land-

selling business, and that such publication was undertaken without his authority.

15. He submits that the said flyers were circulated to members of the public for commercial promotion, thereby constituting ongoing unlawful processing and dissemination of his personal data.
16. The Complainant purports that the continued distribution of these flyers caused him reputational harm, emotional distress, and infringement of his dignity and privacy.
17. He further avers that the Respondent's actions resulted in unauthorized commercial exploitation of his likeness, which, in his view, deepened the extent of the violation.
18. The Complainant notes that each day the flyers remained in circulation aggravated the harm suffered, thus necessitating urgent regulatory intervention under Section 56 of the Act.
19. The Complainants prayed for the following remedies.
 - i. He seeks a declaration that the Respondent unlawfully collected, processed, and published his image without consent, in contravention of Sections 25, 26, and 30 of the Act.
 - ii. He avers and submits that he is entitled to compensation amounting to KES 3,000,000 for breach of privacy, violation of dignity, and unauthorized commercial exploitation of his likeness.
 - iii. He seeks an order directing the Respondent to cease and desist from any further use, publication, or circulation of his image.
 - iv. He further purports that the Respondent should be compelled to recall and remove all advertising materials digital or physical containing his image.
 - v. Lastly, he notes that he is open to any additional reliefs or remedies the Office may deem just and appropriate in the circumstances.

[Signature]

ii. THE RESPONDENT'S RESPONSE

20. The Respondent submitted a response to the notification of complaint in a letter dated 24th October, 2025.
21. The Respondent avers that the promotional campaign in question comprised several images which were reasonably believed to be licensed stock photographs or images provided with consent, and therefore the use of the Complainant's image was not deliberate.
22. The Respondent further submits that the flyer was prepared by its marketing team for a limited and controlled audience, emphasizing that it was never intended for broad or mass distribution.
23. The Respondent purports that, as a matter of standard practice, individuals whose images appear in their promotional materials ordinarily sign consent forms, noting that such procedures were already in place at the time of preparing the flyer.
24. The Respondent avers that the inclusion of the Complainant's image was inadvertent and unintentional, and was based on an honest assumption that the image was appropriate and authorized for use.
25. The Respondent submits that the flyer was circulated only on a limited scale and therefore did not cause reputational, financial, or emotional harm to the Complainant.
26. The Respondent further notes the Complainant's concerns and acknowledges the requirements imposed under the Data Protection Act, indicating that they take compliance seriously
27. Lastly, the Respondent avers that upon receiving notification of the complaint, they promptly halted further distribution, retrieved the remaining flyers, and strengthened their internal data protection and compliance procedures to prevent recurrence.

iii. THE COMPLAINANT'S REJOINDER

28. The Complainant's advocates vide a letter dated 14th November, 2025, filed a rejoinder to the Respondent's response stating that;

29. The Complainant avers that the Respondent has effectively admitted the central fact of processing, namely, the use of his image in commercial advertising flyers, and therefore submits that the only remaining issue for determination is the lawfulness of that processing.

30. He further submits that, by the Respondent's own admission, his image was processed for commercial advertising purposes. Accordingly, he contends that the legal burden to demonstrate the lawfulness of this processing, particularly by proving that he gave consent, rests squarely and exclusively with the Respondent.

31. The Complainant avers that the Respondent has wholly failed to discharge this burden. He notes that the Respondent relies merely on an unsubstantiated assertion of a "reasonable belief" that the image was sourced from a stock library, yet no evidence has been adduced in support of this claim. Additionally, the Respondent's annexation of a blank, unused consent form serves only to underscore the absence of any explicit consent.

32. The Complainant submits that the Respondent's inability to provide a signed consent form bearing his name and signature constitutes conclusive proof that his personal data was processed without a lawful basis, in direct violation of Sections 25 and 30 of the Data Protection Act.

33. The Complainant further notes that the Respondent failed to act on or respond to his demand letter dated 19 May 2025, which had raised concerns regarding the violation of his privacy and the unauthorized use of his image. Consequently, he avers that this failure undermines the good faith and corrective measures the Respondent now seeks to rely upon.

34. He avers that the Respondent has already admitted that the advertising flyers were used for the commercial promotion of its land-selling business, and therefore this constitutes an unequivocal "use for gain."

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35. The Complainant purports that the use of his image to promote a business and attract clients amounts to direct commercial exploitation. In the absence of the explicit consent mandated under Section 37 of the Act, he submits that the Respondent's actions were not only unlawful but amount to a statutory offence.

36. He submits that his claim for compensation of Kshs. 3,000,000 is justified and aligns with the principles and penalties envisioned by Parliament for the commercial misuse of personal data.

37. The Complainant avers that data protection operates under a strict liability regime, and therefore, the breach was complete the moment his personal data was processed without authorisation. He submits that the Respondent's lack of intent does not absolve it of liability although it may, at best, be relevant only to mitigation.

38. Finally, the Complainant notes that the Respondent's assertion of "no demonstrable harm" is legally untenable. He avers that the unauthorized commercial use of his likeness is, in itself, a violation of his fundamental rights under Articles 28 (Dignity), 31 (Privacy), and 40 (Property) of the Constitution. He contends that he has suffered emotional distress, loss of control over his image, and unjustified exploitation of his likeness for another's commercial gain.

F. INVESTIGATIONS UNDERTAKEN

39. The Office examined the complaint lodged by the Complainant, including screenshot of text messages and calls adduced in support thereof, the Respondent's written response, and all documents submitted by both parties as evidence.

G. ISSUES FOR DETERMINATION

40. In light of the above, the following issues fall for determination by this Office:

- i. Whether the Respondent obtained express valid consent from the complainant to process his image 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 VALID CONSENT FROM THE COMPLAINANT TO PROCESS HIS IMAGE FOR COMMERCIAL PURPOSES.

41. Section 2 of the Data Protection Act defines consent as *express, unequivocal, free, specific, and informed*. This means that for a data controller or processor to lawfully use a person's image, the individual must clearly understand what they are agreeing to and must give that agreement willingly and specifically for that purpose.

42. 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. This certainty requires more than just a confirmation that they have read and understood the terms and conditions. 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.

43. 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.

44. Section 32 of the Act further provides that the burden of proof lies entirely on the Respondent to show that the Complainant actually gave consent. Consent must be tied to a specific purpose, must be voluntary, and must be capable of verification.

45. 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.*

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(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 supplied)

46. 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 authorised 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."

47. 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.

48. In this case, the Respondent did not meet any of these requirements. They did not show that the Complainant was informed about the intended use of his image. They did not show that the Complainant agreed, nor did they provide any signed or recorded consent. Instead, the Respondent relied on an assumption that the image was from a stock library and attached a blank, unused consent form, which does not prove anything.

49. The Respondent also admits that the flyers were used to promote its land-selling business. This constitutes commercial use, and under Section 37(1)(a)

of the Act, personal data cannot be used for commercial purposes without **express consent** from the data subject.

50. Given the above, and noting that the Respondent failed to provide any evidence of express consent, this Office finds that the Respondent did not obtain the Complainant's express consent to process his image for commercial purposes, as required by the Data Protection Act and its regulations.

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

51. Pursuant to Regulation 14 (2) of the Enforcement Regulations, a determination shall state the remedy to which the complainant is entitled. The remedies are provided for in Regulation 14 (3) of the Enforcement Regulations.

52. The Complainant requested this Office to issue an award of compensation. Section 65 of the Act provides 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. The Section indicates that damage included financial loss and damage not involving financial loss including distress.

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

54. In considering whether to issue compensation, the Office takes into consideration the use of the Complainant's image for commercial purposes without express consent.

55. In this context, the Respondent is hereby ordered to pay the Complainant **Kenya Shillings Five Hundred Thousand (KES 500,000)** for the use of her personal data for commercial purposes without consent.

H. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable.
- ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Five Hundred Thousand (KES 500,000)** 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 10th day of December 2025.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER



