



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1147 OF 2025

CAROLINE WANJIKU KIONI.....COMPLAINANT

-VERSUS-

THE NAIROBI HOSPITAL.....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 her personal data for advertisement and commercial purposes.

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.

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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 7th August 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 complaint filed against it *vide* a letter dated 4th September 2025 and referenced ODPC/CIE/CON/2/1(601).
8. The Office in the said complaint notification letter requested the Respondent to furnish the Office with –
 - a) A response to the allegation made against the Respondent by the Complainant;
 - b) Any relevant materials or evidence in support of their response;
 - c) A contact person who can provide further details as regards to the complaint;
 - d) The lawful basis relied upon to process the Complainant's personal data for commercial purposes;
 - e) A detailed procedure on how data subjects can exercise their data protection rights;
 - f) The Respondent's data protection policy;
 - g) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the complainant and to ensure that such occurrences mentioned in the complaint do not take place again; and
 - h) Any other information they wish the office to consider.

9. 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 Respondents of the options of -

- Reviewing the complaint and summarily resolving the same to the satisfaction of the Complainant, or
- Resolving the complaint through mediation, negotiation and/or conciliation, as the alternative dispute resolution (ADR) mechanisms provided for by the Act and the Regulations.

10. The Respondents responded to the notification letter on 24th September 2025. In addition to the response to the Complaint, the respondent requested that the complaint be resolved through mediation according to Section 9 (1) (c) of the Act, Regulation 15 of the Enforcement Regulations, and the Alternative Dispute Resolution (ADR) Guidelines published by this Office.

11. As the ADR process is party-driven, the Complainant was requested to consent to resolving the dispute through mediation or conciliation. The Complainant agreed to attempt to resolve the dispute through ADR.

12. Despite attempts to resolve the dispute through ADR, the complaint was not resolved and therefore, the dispute was referred back to this Office for determination as per Regulation 15 (8) of the Enforcement Regulations which provides that where the complaint is not determined through ADR, the Data Commissioner shall proceed to determine the complaint as provided for in the Act and the Regulations.

13. This determination is therefore a result of analysis of the complaint as received, the responses from the Respondent, and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

14. The Complainant alleged that the Respondent, without his consent and/ or justifiable cause, used her images for advertisement on its platforms.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

15. The Complainants lodged the complaint through their advocates pursuant to Regulation 4 (3) of the Enforcement Regulations which state that a complaint may be lodged by a person acting on behalf of the Complainant.
16. The Complainant contended that she was admitted to the Respondent's facility for medical treatment and remained under the Respondent's care until her discharge on 23rd September 2024.
17. That subsequent to her discharge, she became aware that during her period of admission, a member of the Respondent's staff covertly recorded her while she was receiving medical care
18. That the recording was done without her knowledge or any form of consent. Additionally, the Complainant contended that the Respondent used the said unauthorized recording in a promotional advertisement displayed on the Respondent's internal digital screens, wherein the Complainant's image and likeness are used to market the hospital's services.
19. That the promotional video includes commentary by the Respondent's Senior Nurse, endorsing the quality of care provided by the facility again, without the Complainant's consent or prior knowledge.

ii. THE RESPONDENT'S RESPONSE

20. The Respondent in its response stated that sometime on 17th September 2024, the Complainant was involved in a videography exercise sanctioned by the organization.
21. That prior to the capturing and use of her images and recordings, consent was explicitly sought, freely given, and was without coercion.
22. The Respondent stated that the images in question were solely for educational purposes, and only featured for their Hospital Consumption. That upon receipt of

the demand letter issued, it ceased, acted immediately and removed all related content from the internal TVs, without delay.

F. ISSUES FOR DETERMINATION

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

- i. Whether the Respondent obtained express consent from the Complainant to process her personal data for commercial purposes; and
- 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 HER PERSONAL DATA FOR COMMERCIAL PURPOSES.

21. It was the Complainant's position that the Respondent covertly recorded her while undergoing treatment in the Respondent's facility and used the said recording for advertisement and or commercial purposes.

22. It was the Respondent's position that in as much as it used the Complainant's recording, the Complainant had consented to the use of the said recordings.

23. The Black's Law Dictionary, 10th Edition, defines consent as "agreement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person.

24. Section 2 of the Act 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. 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.

26. 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.

27. 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 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)

32) 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.*"

33) Regulation 14 (1) of the Data Protection (General) Regulations 2021 further elaborates Section 37 of the Act as follows:-

14. Interpretation of commercial purposes

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(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.

28. From the evidence adduced to this office, it is evident that the Respondent used the recordings containing the Complainant's personal images to advertise its services. As such, the Complainant's image was being used to advance the Respondent's commercial and economic interests.

29. The Respondent stated that it recorded the Complainant with her consent but it did not provide any proof to support its contention. As such it did not discharge its burden of proof as envisaged under Section 32 (1) and 37 of the Act.

30. 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.

31. 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.

32. Having considered the merits of the complaint, the evidence adduced, and having found that the Respondent did not obtain valid consent from the Complainant to use her images for commercial purposes, it therefore, follows that there has been a violation of the Act by the Respondent to that extent.

33. The Complainant sought various remedies, including an order for immediate takedown and cessation of any further use or display of the unauthorised video, and an order for compensation.

34. 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. 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.

35. Having found that the Respondent did not obtain valid consent from the Complainant for the use of her image for commercial purposes, the Respondent is hereby directed to compensate the Complainant the amount of **KES 500,000 (Kenya Shillings Five Hundred Thousand Shillings)**.

G. FINAL DETERMINATION

36. In the ultimate, the Data Commissioner therefore makes the following final determination:

- i. The Respondent is hereby found liable.
- ii. The Respondent is ordered to compensate the Complainant **KES 500,000 (Kenya Shillings Five Hundred Thousand Shillings Only)**.
- iii. The Respondent is hereby ordered to delete the advertisements containing the Complainant's personal data from all its online platforms and provide proof thereof to this Office within fourteen (14) days from the date of this determination.
- iv. Failure to adhere to (iii) above, an Enforcement Notice shall hereby be issued.

v. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 16th day of December 2025.



IMMACULATE KASSAIT, SC, MBS
DATA COMMISSIONER



