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**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 1980 OF 2024**

NANCY WANSATO MAROACOMPLAINANT

-VERSUS-

VIVO ENERGY KENYA LIMITED.....1ST RESPONDENT

ARTCAFFE COFFEE & BAKERY LIMITED.....2ND RESPONDENT

MAGIC REEL PICTURES LIMITED.....3RD 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 on 2nd December 2024 from the Complainant. The complaint relates to the alleged use of the Complainant's image for marketing and promotional purposes on billboards without obtaining further consent and/or authorization from the Complainant upon the expiry of an agreement.

B. LEGAL BASIS

2. Article 31(c) and (d) of the Constitution of Kenya 2010 provides for the right to privacy. Consequently, as an effort to further guarantee the same, the Data Protection Act 2019 (hereinafter 'the Act') was enacted.
3. The Office of the Data Protection Commissioner (hereinafter 'this Office' or 'the Office') was established pursuant to Section 5 of the Act and is mandated with the

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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 (Complaint Handling Procedure and Enforcement) Regulations, 2021 (hereinafter '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 2nd December 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainant who is an aggrieved data subject.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the 1st, 2nd and 3rd Respondents of the complaint filed against them *vide* letters dated 6th January 2025 and referenced **ODPC/CONF/1/5/Vol II (400)**, **ODPC/CONF/1/5/Vol II (401)** and **ODPC/CONF/1/5/Vol II (399)** respectively, all served on 8th January 2025. In the notification of the complaint, the Respondents were informed that if the allegations by the Complainant were true, they were in violation of various provisions of the Act. Further, the Respondents were 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 regarding the complaint;

- c. The legal basis relied on to process and engage with the Complainant's personal data;
 - d. A duly signed contract/agreement between the Respondents and the Complainant (if any);
 - e. Proof of consent from the Complainant to use her image on posters/billboards;
 - f. Any relevant materials or evidence in support of their responses;
 - g. A detailed procedure on how they fulfil the rights of data subjects;
 - h. Their data protection policies;
 - i. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such an occurrence mentioned in the complaint does not take place again; and
 - j. Any other information they wish the Office to consider.
8. The 1st Respondent replied to the notification of complaint letter via a letter dated 14th January 2025, in which they stated that they were reviewing the complaint with a view to resolving it through negotiations. Furthermore, on 30th January 2025, the Office received a letter from the 1st Respondent's advocates dated 28th January 2025, in response to the complaint.
 9. The 2nd Respondent's advocates replied to the notification of complaint letter via a letter dated 29th January 2025.
 10. The 3rd Respondent's advocates replied to the notification of complaint letter via a letter dated 10th January 2025.
 11. The Complainant filed rejoinders to the Respondents' responses through her advocates via letters dated 4th, 10th and 11th February 2025.
 12. This determination is, therefore, a result of analysis of the complaint as received, the responses from the Respondents, the Complainant's rejoinders to the Respondents' responses and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

13. The complaint relates to the alleged use of the Complainant's image for marketing and promotional purposes on billboards without obtaining further consent and/or authorization from the Complainant upon the expiry of an agreement.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S CASE

14. The Complainant stated that there was an agreement between her and the 3rd Respondent dated 1st April 2021 for photography services, intended for branding purposes, for a period of three years until 1st April 2024. she added that on the same day, 1st April 2021, the 3rd Respondent took her photographs.

15. The Complainant stated that according to the terms of the agreement, she authorized the 3rd Respondent to distribute her images to the 1st Respondent solely for marketing and promotional services at its Select shops across the country within the terms of the agreement, during the period of the agreement of three (3) years.

16. The Complainant stated that the 1st Respondent proceeded to process her images and displayed them at its Shell Select shops across the country, including Shell Karen, Eldoret, Kahawa Sukari, Kisumu, Mombasa Road, Nyali, Thika Road, Yaya, and Kileleshwa. (hereinafter "Shell Select Shops").

17. The Complainant alleged that on 27th March 2024, she discovered that the 1st and 2nd Respondent used her image on a billboard erected along Kiambu Road for marketing and promotion of their brands and services without her authorization.

18. Furthermore, the Complainant stated that she had neither consented to this use nor had the Respondents informed her that her images would be displayed on the billboard for commercial purposes and for an indefinite period.

19. Further, upon the expiry of the Agreement on 1st April 2024, the Complainant stated that the 1st Respondent continued to use the Complainant's images at its Shell Select Shops across the country without further authorization or consent.

20. The Complainant added that the images depicting the Complainant and displayed at the 1st Respondent's Shell Select Shops were taken by the 3rd Respondent on 1st April 2021, and the images displayed on the billboard by the 1st and 2nd Respondents were

taken on 8th February 2023. Moreover, the Complainant stated that the usage of the said images is beyond the term and scope of the Complainant and 3rd Respondent's agreement and without consent to such further use.

21. The Complainant alleged that she wrote to the 1st and 3rd Respondent on 3rd April 2024, seeking an explanation as to the status of her contract and the continued use of her images on the 1st Respondent's Shell Select Shops to advertise and promote its brand and services, and, in its response, the 3rd Respondent stated that it would discuss and resolve the raised issues with the 1st Respondent. The Complainant added that the 3rd Respondent failed to provide any further feedback and/or resolve the issues she raised on 3rd April 2024.
22. The Complainant stated that the Respondents' use of her images, as described above, resulted in an assumption by the public and potential business partners that she was or is working in partnership with the 1st and 2nd Respondent as their brand ambassador which is not the case. Moreover, the Complainant stated that this has subjected her to significant business loss as she is unable to obtain modeling contracts with potential agencies such as Brads Fashion, or clients such as Rubis, Total, Face of Clearview, Delmonte, Blueband and Cooperative Bank with an expected cumulative income of Kshs. 900,000.
23. The Complainant stated that, through her advocates, she sent a demand letter dated 25th July 2024 to the Respondents for the removal of the billboard along Kiambu road and posters from all the 1st Respondent's Select Shops and compensation to the Complainant for the unauthorized use. She added that the Respondents failed to comply with her notice as per the demand letter.
24. The Complainant further stated that: -
 - a. The Respondents collectively failed to inform her that her images would be used on a billboard and that the 1st Respondent failed to inform her that her images would be used at its Select Shops beyond the term of the agreement and for an indefinite period;

- b. The 3rd Respondent failed to inform her that her images would be shared with the 2nd Respondent and on the technical and organisational safeguards adopted;
- c. The Respondents retained her images beyond the term of the agreed period and processed the same without obtaining further consent;
- d. She suffered financial loss and loss of modelling contracts of Kshs. 3,750,000 and Kshs. 900,000 respectively; and
- e. She suffered emotional distress, harm and lost control of her personal data due to the actions of the Respondents.

25. The Complainant attached the following documents to support her complaint:

- a. Screenshots of her WhatsApp messages engaging Magic Reel Pictures and a follow-up email message she sent to Vivo Energy agent engaging Magic Reel Pictures Ltd.
- b. Pictures of her image on billboards on different shell select stations and roads.
- c. A picture of her image and Identification for comparison.

26. In conclusion, the Complainant sought the following remedies: -

- a. A permanent injunction to issue to the Respondents restraining them from publishing and/or using her images and likeness in their advertisement or promotion in any way without her consent and commensurate compensation;
- b. Compensation for general damages or losses resulting from the unauthorized use of her images without explicit consent;
- c. Any other relief that the commission deems fit to grant.

II. THE RESPONDENTS' RESPONSES

a. 1st Respondent's Response

27. The 1st Respondent responded to the Complaint *vide* a letter dated 14th January 2025, in which they stated that they were reviewing the complaint with a view to resolving it through negotiations. Furthermore, on 30th January 2025, the Office received a letter

from the 1st Respondent's advocates dated 28th January 2025, responding to the issues raised in the complaint.

28. The 1st Respondent stated that it is an oil marketing company involved in the retail and distribution of fuels and lubricants within the region under the "Shell" brand. Furthermore, they stated that it has convenience stores, which also include the 2nd Respondent, to offer one-stop-shop services to their customers.
29. They stated that, in an aim to ensure the visibility of its products across the market, it contracted the 3rd Respondent to offer advertisement services.
30. The 1st Respondent stated that it was aware the Complainant and the 3rd Respondent entered into an agreement dated 8th February 2022 for modelling work as part of the advertisement services. They added that the agreement was valid for three years, lapsing on 7th August 2025, contrary to the Complainant's allegations.
31. The 1st Respondent added that as per the agreement, it was agreed that the Complainant would receive Kshs. 70,000, and she irrevocably granted and assigned the entire copyright and all other rights to her images.
32. Additionally, the 1st Respondent stated that the 3rd Respondent and the Complainant entered into another agreement on 8th February 2023, also valid for three years and lapsing on 7th February 2026.
33. Furthermore, it stated that the agreement between the Complainant and the 3rd Respondent did not limit the use of the images to the 1st Respondent's promotional campaign and as per the agreement, the Complainant bound herself exclusively as a model to the 3rd Respondent for the term of the agreement. Therefore, the Complainant cannot claim that she was losing business elsewhere.
34. In conclusion, the 1st Respondent denied the Complainant's claim for breach and reiterated that the advertisements carried out were in line with the agreements of the parties. Furthermore, it stated that data protection requirements had been adhered to in fulfilment of the Complainant's data subject rights as shown by the agreements and various internal data protection policies.
35. The 1st Respondent relied on the following to support its case: -

- a. Agreement dated 8th February 2022 between Magic Reel and the Complainant.
- b. Agreement dated 8th February 2023 between Magic Reel and the Complainant.
- c. Images of the Complainant taken at their outlet.
- d. Various Policies on Data Protection including; Data Protection Policy, Data Subject rights procedure, Privacy Policy and Privacy Breach Incident Response Procedure.

b. The 2nd Respondent's Response

36. The 2nd Respondent's advocates replied to the notification of complaint letter *via* a letter dated 29th January 2025.
37. The 2nd Respondent stated that the 1st and 2nd Respondents entered into a business arrangement by way of a Memorandum of Understanding to partner on the development of quick-service restaurants and shop concepts within Shell service stations run by the 1st Respondent in Kenya.
38. The 2nd Respondent stated that as per the Memorandum of Understanding the 1st Respondent was responsible for marketing the quick service restaurants and shop concepts, whereas the 2nd Respondent was required to provide the necessary branding materials to the 1st Respondent.
39. The 2nd Respondent averred that it was not privy to the contract between the 1st and 3rd Respondents on images for the marketing campaign and that the alleged unauthorized use of the Complainant's images did not fall under its purview.
40. The 2nd Respondent added that there was a legal basis for use of the said images by virtue of the agreement between the Complainant and the 3rd Respondent, in which the Complainant expressly consented to the use of her images for a consideration of Kshs. 70,000.
41. In conclusion, the 2nd Respondent prayed for the dismissal of the complaint as it lacked merit.

c. The 3rd Respondent's Response

42. The 3rd Respondent stated that it entered into several agreements dated 1st April 2021, 8th February 2022 and 8th February 2023 with the Complainant, to use her images for branding, advertisement and promotion of the 1st Respondent's business.
43. It further stated that the Complainant was aware of and expressly consented to the use of her imagery rights for marketing and promotion for the 1st Respondent, by appending her signature to the agreements and accepting payment.
44. The 3rd Respondent stated that the Complainant's actions have resulted in its reputational and financial damage, despite fulfilling all its contractual obligations under the agreements between it and the Complainant.
45. In conclusion, the 3rd Respondent stated that the Complainant's claims are without merit as it has not contravened the provision of the Kenya Data Protection Act of 2019.

d. Complainant's Rejoinder to the Respondents

46. The Complainant responded to the 1st, 2nd and 3rd Respondent's responses via letters dated 10th, 4th and 11th February respectively.
47. In response to the 1st Respondent's response the Complainant reiterated that: -
- a. Consent under the Data Protection Act, 2019 must be specific, informed, and freely given. Any ambiguity or lack of clarity in the agreements raises concerns about compliance.
 - b. The agreements between the Complainant and the 3rd Respondent do not explicitly authorize the use of her images beyond the 3rd Respondent's advertisement purposes. She added that the 1st Respondent must demonstrate that it obtained direct consent or that it had explicit authority to extend the use of the images to its branding efforts.
 - c. The 1st Respondent as a separate entity from the 3rd Respondent, is a data controller when it processes her images for marketing. Therefore, it must independently ensure compliance with the Act, including obtaining valid consent for data processing.

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- d. There was no clarity on how her image would be used beyond the agreement with the 3rd Respondent.

48. In response to the 2nd Respondent's response, the Complainant reiterated that: -

- a. The 2nd Respondent, as an entity benefiting from the use of her image in marketing materials, cannot absolve itself from compliance with data protection obligations merely by stating that the marketing function was assigned to the 1st Respondent through their agreement.
- b. The 2nd Respondent has failed to demonstrate that it exercised due diligence in ensuring compliance with data protection laws before utilizing her images.

49. In response to the 3rd Respondent's response, the Complainant reiterated that: -

- a. Consent relied on by the 3rd Respondent should be express, informed and unambiguous as per the Act.
- b. The agreements do not explicitly authorize the 3rd Respondent to transfer or sublicense the use of her images to third parties.
- c. The 3rd Respondent, was obligated to inform the Complainant that her images would be used specifically for the 1st and 2nd Respondent's marketing campaigns.

F. INVESTIGATIONS UNDERTAKEN

50. This Office reviewed the complaint as lodged, the Respondents' responses, the Complainant's reply to the Respondents' responses and all the supporting documents provided by all the parties.

51. The investigation process entailed a review of available documentation including;

- a. The complaint document/ form as lodged by the Complainant and the supporting evidence;
- b. The Respondents' responses;
- c. Copy of the signed agreements; and
- d. Memorandum of Understanding between 1st and 2nd Respondents.

52. The following evidence was collected;

- a. Images of the Complainant's WhatsApp messages engaging the 3rd Respondent's agent.
- b. Images of the Complainant's follow up email message sent to the 1st Respondent's agent engaging the 3rd Respondent's agent.
- c. Pictures of the Complainant's image on billboards at different Shell Select service stations and roads.

G. ISSUES FOR DETERMINATION

53. It is not in contention that the Respondents used the Complainant's images for the 1st and 2nd Respondents' marketing and promotion of services on billboards and at the quick service restaurants in various Shell Service Stations.

54. Moreover, this Office reiterates that the Data Protection Act, 2019 confines its mandate to the violation of the right to privacy and regulating the processing of personal data. Therefore, the Office will restrict its determination to its mandate and advises the Complainant to seek redress at the appropriate forum for claims outside the Office's mandate.

55. In light of the above, the following issues fall for determination by this office: -

- i. Whether the Respondents fulfilled their obligations under the Act;
- ii. Whether the Respondents obtained valid consent to process the personal data of the Complainant;
- iii. Whether there was infringement of Complainant's rights under the Act; and
- iv. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENTS FULFILLED THEIR OBLIGATIONS UNDER THE ACT

56. Obligations of data handlers as per the Act are determined by the relationship between the parties and which party is a data controller, data processor or data subject as per the processing activities.
57. The 1st Respondent stated in its response to the complaint, and the 3rd Respondent has not denied, that it contracted the 3rd Respondent to provide advertisement services. Additionally, the 2nd Respondent stated that as per a Memorandum of Understanding between itself and the 1st Respondent, the marketing of the quick service restaurants would be the responsibility of the 1st Respondent.
58. The alleged agreement between the 1st and the 3rd Respondent has not been provided to this Office. However, a review of the annexed Memorandum of Understanding between the 1st and 2nd Respondent clearly demonstrates that the responsibility for marketing the quick service restaurants and the select shops lies with the 1st Respondent.
59. Therefore, for the purposes of this complaint the Office finds that the 1st Respondent is a data controller, the 2nd Respondent is a third party and the 3rd Respondent is acting as a data controller for purposes of the agreement between itself and the Complainant, and a data processor for the 1st Respondent, with each having various obligations.
60. All the Respondents had an obligation under Section 25 of the Act to ensure that the Complainant's personal data is, amongst others:
- i. processed in accordance with her right to privacy;
 - ii. processed lawfully, fairly and in a transparent manner in relation to the Complainant;
 - iii. collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes; and

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61. Section 29 of the Act provides an obligation to data controllers or data processors of the duty to notify the data subject. Notably, the data subject has to be informed of, *inter alia*;

- i. rights specified under Section 26;
- ii. the fact that personal data was being collected;
- iii. the purpose of the collection of their personal data;
- iv. the third parties whose personal data has been or will be transferred to
- v. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

62. The 1st and 3rd Respondents had a duty to notify the Complainant of her rights under the Act, the fact that her image was collected and was to be used in the 1st and 2nd Respondents' marketing campaign, and the measures taken to ensure the safety of her personal data. The 1st and 3rd Respondent failed to demonstrate that they fulfilled this obligation under Section 29 of the Act.

63. In addition, Section 30 of the Act gives instances where a data controller or data processor can lawfully process personal data. It states that a data controller or data processor shall not process data unless the data subject consents to the processing for one or more specified purposes or the processing is necessary for the reasons given in subsection (b).

64. Furthermore, Section 37(1) of the Act states 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.***"

65. The Respondents' act of publishing the Complainant's image on a billboard and at the quick service restaurants was intended to attract customers. By using the Complainant's image for commercial purposes without having sought and obtained express consent from the Complainant, means that they did not fulfill their obligations under Section 37(1) of the Act.

66. Section 42(2), (3) & (4) of the Act provides as follows -

(2) Where a data controller is using the services of a data processor—

- a. *the data controller shall opt for a data processor who provides sufficient guarantees in respect of organisational measures for the purpose of complying with section 41(1); and*
- b. ***the data controller and the data processor shall enter into a written contract*** which shall provide that the data processor shall act only on instructions received from the data controller and shall be bound by obligations of the data controller.

(3) Where a data processor processes personal data other than as instructed by the data controller, the data processor shall be deemed to be a data controller in respect of that processing.

(4) A data controller or data processor shall take all reasonable steps to ensure that any person employed by or acting under the authority of the data controller or data processor, complies with the relevant security measures.

67. The particulars of the contract envisaged between the Data Controller and the Processor are espoused in Regulation 24(2) of the Data Protection (General) Regulations.

68. No evidence was adduced by the 1st Respondent to demonstrate they entered into a data processing agreement with 3rd Respondent to process personal data of the Complainant on its instructions.

69. From the foregoing, this Office finds that the 1st and 3rd Respondents did not fulfil the above obligations as set out under the Act and the attendant Regulations.

II. WHETHER THE RESPONDENTS OBTAINED VALID CONSENT TO PROCESS THE PERSONAL DATA OF THE COMPLAINANT

70. 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.

71. This means there must be a clear signal that the data subject agrees or has agreed to the processing. Additionally, Consent must be unambiguous and verifiable to the extent that one must be able to demonstrate that the data subject consented to the

specified processing. Section 30 (1) (a) of the Act is clear on specification of the processing activity. It 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.

72. 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.

73. Moreover, 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.***

74. 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

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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.

75. The Complainant herein argued that the Respondents used her images, after the expiration of an agreement, without seeking further consent or authorization, she also stated that the 3rd Respondent, while getting her consent, failed to inform her that her images would be used in the 1st and 2nd Respondents' marketing project to advertise their services.
76. On the other hand, the Respondents, relied on the agreements between the Complainant and the 3rd Respondent and argued that the Complainant gave express consent for the use of her images to the 3rd Respondent.
77. The Office has reviewed the evidence placed before it, particularly the agreements between the 3rd Respondent and the Complainant as well as the photos taken at the 1st and 2nd Respondents' premises, and concludes that the consent relied on by the Respondents fell short of the threshold set by the Act.
78. It is clear that the Complainant's images were taken at the 1st and 2nd Respondents' premises and that the Complainant appears to be a willing participant. However, the law clearly states that consent must be **express, unequivocal, free, specific, and informed**. The agreements between the Complainant and the 3rd Respondent only indicated that the images would be used by the 3rd Respondent within its business but failed to indicate any other parties involved in the use of the Complainant's images. That is, the agreements fail to inform on which other third parties are to use the Complainant's image.
79. Specifically, the agreement dated 8th February 2023, in describing the relationship between the 3rd Respondent and the Complainant states as follows: -

A. The principal is a limited liability Company in the business of taking pictures of people, places, events and objects either in studio or on-site at various locations, to be used for various purposes including in books, advertisements and catalogues. The principal is in the process of carrying out branding and advertisement work for its business (the "Project")

B. The Model agrees to provide exclusive services as a model as requested by the Principal during the Term (as defined below)

C. The Model will grant the principal proprietary rights over the photographs and material taken during or after the date of this Agreement, and to which the Model agrees to hand over the exclusive rights

80. Whereas express consent requires a clear written statement confirming the granting of specific and informed consent to avoid ambiguity, the agreements between the 3rd Respondent and Complainant fail to meet that threshold, only granting consent to the 3rd Respondent to use the images for branding its business and not to any other third party.

81. Consequently, since the 2nd Respondent was a Third Party as far as this processing is concerned, the Office finds that the 1st and 3rd Respondents failed to obtain valid consent and have not discharged their burden of proof to demonstrate that the Complainant expressly consented to the use of her image for commercial purposes, as envisaged under the Act.

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

82. Section 26 of the Act outlines the rights of a data subject, including the right to be informed of the use to which their personal data is to be put. The Act states that:

A data subject has a right-

- a. to be informed of the use to which their personal data is to be put;*
- b. to access their personal data in the custody of the data controller or data processor;*
- c. to object to the processing of all or part of their personal data;*
- d. to correction of false or misleading data; and*
- e. to deletion of false or misleading data about them.*

83. From the above provision of law, it is evident that one needs to be informed of the use to which their personal data is to be put. This right to be informed enables the data subject to make a conscious decision relating to the use of his/ her personal data. It is from being informed and the information given to the data subject that the data

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subject gets to elect and/or choose whether to consent to the processing of his/ her personal data or not. As stated earlier herein, valid consent is a product of conscious decision-making.

84. With regards to this complaint, having established that the 1st and 3rd Respondents failed to obtain a valid consent within the meaning of the Act on informing the Complainant on all the parties that were involved in the processing of her images for commercial purposes, it therefore follows that the Complainant's right to be informed was violated.

85. It is therefore the finding of this Office that the right of the Complainant to be informed of the use of her personal data was violated and as such the 1st and 3rd Respondents are found liable for violation of the Complainant's right.

86. On the right to object to processing, the Complainant also alleged that she had written a demand letter to the Respondents dated 25th July 2024 on the removal of the billboard along Kiambu road and posters from all the 1st Respondent's Select Shops. However, the Complainant failed to provide the Office with evidence to substantiate this allegation and therefore, the Office was unable to determine if a violation occurred.

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

87. Regulation 14 (2) of the Enforcement Regulations provides that 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.

88. Having considered the merits of the complaint, the evidence adduced by the Complainant and the Respondents, and having found that the 1st and 3rd Respondents processed the Complainant's image for commercial purposes without the requisite consent as stipulated under the Act and violated the Complainant's right to be informed, it therefore, follows that there has been a violation of the Act by the 1st and 3rd Respondent to that extent.

89. 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.

90. 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.

i. The Complainant sought various remedies including financial loss, loss of income and emotional distress. In the forgoing, the 1st and 3rd Respondent are **ordered to pay the Complainant Kenya Shillings Seven Hundred and Fifty only (KES. 750,000)** as compensation for the violation of the Complainant's rights under the Act, failure to fulfil their obligation and for the use of the Complainant's personal data for commercial purposes without her express consent, in the following manner –

- a. 1st Respondent – **Kenya Shillings Five Hundred Thousand (KES 500,000)**
- b. 3rd Respondent – **Kenya Shillings Two Hundred and Fifty Thousand (KES 250,000).**

91. Having found that the Respondents violated the Complainant's rights provided for under the Act and did not fulfil its obligations provided for under the Act, an enforcement notice shall be issued to the Respondents.

H. FINAL DETERMINATION

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

- i. The Complaint against the 2nd Respondent is dismissed.
- ii. The 1st and 3rd Respondents are hereby found liable for violating the Complainant's right to be informed, and for using her personal data for commercial purposes without obtaining her express consent.
- iii. The 1st and 3rd Respondent is hereby **ordered to pay the Complainant Kenya Shillings Seven Hundred and Fifty (KES. 750,000)** as compensation in the following manner –

- a. 1st Respondent – **Kenya Shillings Five Hundred Thousand (KES 500,000).**
- b. 3rd Respondent – **Kenya Shillings Two Hundred and Fifty Thousand (KES 250,000).**

iv. An enforcement notice to hereby issue against the 1st and 3rd Respondents.

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

DATED at NAIROBI this 1st day of March 2025.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

