



MARKETING CAMPAIGNS AND DATA PROTECTION COMPLIANCE

A. BACKGROUND

Esther Kanza Mbuvi v Grain Industries Limited ODPC Complaint No. 387 of 2024: the Office of the Data Protection Commissioner (ODPC) in Kenya has issued a ruling against Grain Industries Limited (the Respondent) for violation of a data subject's data protection laws. The Respondent has been ordered to pay a fine of KES. 1 million for using a data subject's (Complainant's) image for marketing purposes without obtaining her consent.

The Respondent claimed that it had hired an independent third-party (marketing agency), who would be responsible for collection of data subjects personal data for commercial purposes, and as such, set out terms and conditions which would capture the consent of the persons who wished to have their personal data processed for the purposes of the marketing campaign.

However, the Complainant in this instance did not give her express consent, as her daughter was the one who had enrolled for the marketing campaign, and the Respondent took the daughter's acceptance as the Complainant's acceptance, consequently using her personal data for the marketing campaign.

Following the discovery of an unauthorized use of her image and likeness, the Complainant contacted the Respondent, demanding the removal of the unauthorized materials and sought appropriate compensation, and despite her repeated requests, the Respondent failed to heed to the same.

B. LEGAL ISSUES & ANALYSIS

The Data Protection Act of Kenya, 2019, (the Act) establishes very stringent regulations for the handling of personal data. The Act requires companies to obtain express, unequivocal, free, specific and informed indication of the data subject's wishes by a statement or by a clear affirmative action, before using an individual's personal information, including images for commercial purposes. As such, the following emerge as the prominent issues for determination:

1. Whether the Respondent obtained valid consent to process the personal data of the Complainant?

- 1.1. The Complainant stated that she did not consent to the collection of her personal data. Conversely, the Respondent claimed to have indirectly acquired the Complainant's personal data after receiving consent from the Complainant's daughter to process the personal information, after she accepted the terms and conditions set out during the marketing campaign. The ODPC found that the Complainant did not expressly give out her consent for processing of her personal data, and the Respondent did not directly obtain the said consent from the Complainant.
- 1.2. Furthermore, the Act has set out instances where one's personal data can be collected without obtaining prior consent. However, the Respondent did not meet these requirements. In view of the above, the Respondent was found to have not obtained consent from the Complainant to process her personal data.

2. Whether the Respondent fulfilled its obligations under the Act?

- 2.1. The Act has set out obligations for persons interacting with data subject's personal data, i.e., procession of data in accordance with right to privacy, procession of data in a lawful, fair and transparent manner, amongst other obligations. There is a requirement for there to be a written contract (data processing agreement) in the event a legal entity hires an independent third-party for collection of data subject's personal data, which will bind both parties to act accordingly (with the Act) as data controllers and data processors.
- 2.2. The Respondent was found to have not fulfilled any of the obligations set out in the act. Failure to comply with these obligations result into liability, as was the case in this instance.

3. Whether the Complainant is entitled to any remedies under the Act and the attendant regulations?

- 3.1. The Act provides that any 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. Seeing as the Respondent had been found liable for processing the Complainant's personal data without her express consent, as well as failing to follow the obligations set out in the Act, it was found to be in contravention of requirements set out in the Act. This formed the basis of the award of **KES. 1 million**.

C. CONCLUSION AND RECOMMENDATION

This ruling against Grain Industries Limited has continued underscore the importance of companies adhering to data protection regulations in Kenya. The ODPC's decision serves as a reminder to companies to ensure explicit consent is obtained before using a data subject's personal data.

Some of the legislative requirements for a Data Processing Agreement/ Data Sharing Agreement should cover include:

1. Subject matter.
2. Duration of processing.
3. Nature and purpose.
4. Type of personal data.
5. Categories of data subjects.
6. Obligations and rights of data controller.
7. Instructions of the data controller.
8. Duty of the data processor.
9. Security measures.
10. Provision on deletion/return of all personal data.
11. Right of audit and inspection by data controller.

In conclusion, it is crucial to note that the Act has mandated any persons handling data subject's personal data to ensure compliance with the Data Protection Act and its subsidiary legislation.