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DATA PROTECTION AND PRIVACY: **Recent Developments and Trends in Kenya**

Since its inception the Data Protection Act, 2019 (DPA) has been tested through determinations made by the Office of the Data Protection Commissioner and court judgements. The Office of the Data Protection Commissioner (ODPC) is established under Section 5 of the DPA. Section 8(f) of the DPA provides that the ODPC can receive and investigate any complaint by any person on infringements of the rights under the DPA. This provision has given a clear path for the filing of multiple complaints regarding the level of compliance with the requirements under the DPA and the regulations. Digital lenders, schools, and even recreational facilities such as clubs have been at the receiving end of these complaints, eliciting questions like what can be defined as personal data, what constitutes consent from a data subject and more.



EMERGING COMPLIANCE TRENDS IN KENYA

In late September 2023, the ODPC issued Penalty Notices to three data controllers for failing to comply with the Act's rules on the processing of data subjects' personal information. The ODPC levied fines ranging from Kshs.1,850,000/= to Kshs.4,550,000/= on three entities, including a school, for various violations of the DPA.

1. Unlawful processing of information

Complaints received by the ODPC on unlawful processing of information have been rampant against digital lenders. There have been numerous complaints against digital lenders who have implemented the mechanism of processing and using their debtor's personal information to demand payment of loans. When using money lending applications, the digital lenders often request access to the contacts on the borrower's phone under the guise of determining their credit worthiness. However, this information is illegally used to contact their close friends, family and acquaintances to illicit payment of the loans when they fall due.

The Office of the Data Protection Commissioner has made multiple determinations on this subject matter, the most recent one being on a digital

credit provider known as Mulla Pride Limited. The ODPC has reiterated that the actions of these digital lenders are a violation of Section 26,28 and 29 of the Act. Section 29 provides that it is the duty of the data controller and data processor to inform the data subject of their rights under section 26 of the act, that is, the fact that their personal data is being collected and purposes for which the data is being collected. Section 28 further connotes that the data being collected should be sourced directly from the data subject. Following several complaints by data subjects of the digital credit lenders' unlawful processing of their information, the ODPC on 5th October 2022 announced that it was conducting a preliminary documentary assessment and audit against 40 digital lenders. Some of the Digital Credit Providers who were listed for this audit include Tala, Zenka Digital, Zuri Cash, Premier Credit, Credit Moja, Coopesa and many others.

2. Privacy Rights of Minors

Section 33 of the DPA provides for stricter requirements for processing of data relating to minors. This provision clearly impacts financial institutions (when providing accounts to minors), healthcare providers, insurance companies, nonprofit organizations, schools and other entities that typically collect and process the personal data of minors.

In 2023 the ODPC made a determination on a complaint filed against Kora Spa, a barber shop based in Embakasi, following the use of images of minors, who had utilized their services, on their social media platform. The ODPC determined that the photos of the minor were personal data as no effort was made to conceal his identity. The ODPC further stated that Kora Spa violated section 33 since the minor's personal data was processed without his parent's or guardian's consent and in a manner that did not safeguard and advance the minor's rights and best interests.

3. Commercial Use of Images without consent

There is no specific legislation on image rights however, the Courts have filled that lacunae by adopting the Data Protection Act and using it to determine matters pertaining to image rights. The Court views image rights with a data protection lens as they intersect with elements of the right to privacy when considered in terms of personal data. This issue was investigated in the case of Catherine Njeri Wanjiru vs Machakos University H.C. Pet No. E021/2021, in which the court recognized the application of the Data Protection Act in fully addressing the right to privacy and the usage of photographs. The court considered:

- The definition of data, determining that photos and photographs in the circumstances in which the university took and stored without consent constituted personal data under the Act.
- The concept of an identifiable natural person and factors that consist of an identifier under the act, establishing that the petitioner was an identifiable person.
- The rights of a data subject under section 26, establishing the right over the use of their data in this case the photographs taken by the university.
- The duties and responsibilities of a data processor under section 29, establishing that the university was a data controller and processor and the responsibilities it has in ensuring data subjects are aware of the processing and use of their data.

In a similar matter the ODPC determined against Roma School in Uthuru for a complaint filed against them following the use of the image of a child for advertisement purposes without consent from the minors' parents or guardians and issued a penalty notice of Ksh 4,500,000. In another similar case the Data Commissioner issued a fine against Oppo Kenya in the sum of Ksh 5 million for using a person's photo on the company's Instagram page without the person's consent.

Recreational facilities like clubs have not been left unscathed. This comes after Casa Vera Lounge was ordered by the Office of the Data Protection Commissioner to pay Ksh.1.8 million to a disgruntled patron after capturing and circulating images of him on social media without written consent. Following the order, numerous entertainment joints issued social media notices informing revelers that they waive any claims for invasion of privacy, defamation, and copyright infringement upon entry into their establishments. However, Data Protection Commissioner Immaculate Kassait in an interview stated that the disclaimers shared by entertainment joints on capturing and sharing customers' photographs online lack a valid legal foundation and do not protect them from liability.

CALLS FOR REVIEW OF THE DATA PROTECTION ACT, 2019

Through the years the Data Protection Act has been implemented in various ways that were not anticipated by the legislators. This brings up the question of whether there is need for new legislation on some of these matters or is the DPA sufficient and flexible enough to cater to the emerging issues.

Some organizations and institutions such as Privacy International, FSD Kenya, Access Now and Amnesty International have called for review of the DPA and given recommendations on the same. Some of the common sections that have been a topic of concern include:

- Section 28 which states that personal data can be collected directly if it is in the public domain or if it is deliberately made public. Just because data is public record does not imply that it is available for further processing, and its 'public' availability should not be interpreted as consent or as another legal basis for processing. Furthermore, a data subject 'deliberately' making data public is insufficient basis for indirectly processing the data without the data subject's direct participation.

- The independence of the ODPC in its operations has also been under scrutiny. The DPA provides for classes of people and data that may be exempted from compliance with data protection regulations in Section 51, including national security and/or public interest; this is operationalized by the Data Protection (General) Regulations by giving discretion to the Cabinet Secretary of ICT to make decisions on what constitutes national security. In addition to this Section 71 states that the Cabinet Secretary may make regulations generally for giving effect to the DPA, and for prescribing anything required or necessary to be prescribed by or under the DPA.
- Section 33 on the processing of data relating to minors omits to clarify what constitutes 'appropriate mechanisms for age verification' as well as 'appropriate mechanisms for parental consent' which consequently leaves room for misinterpretation and assumptions. Safeguards should also be put in place to prevent the use of minors' data for research or statistical purposes, and as noted in section 28, the mere public availability of a minor's data does not imply that it should be processed without consent.

CONCLUSION

The hefty fines issued by the ODPC for infringements of the Data Protection Act are a clear indication that organizations and businesses who handle personal data should do so in accordance with the data protection laws in place. Moreover, entities that handle personal data will also attract civil damages from infringement cases and consequently suffer economic strains. Their clientele base will equally suffer as a result of reputational damage and loss of credibility pertaining to the safety of their clients' data. Organizations need to take the initiative to foster a culture of compliance within their internal structure and can achieve this by:

- Reviewing and frequent revising of the policies and procedures currently in place to ensure they are in compliance with legislation and regulations.
- Conducting training on an annual basis to sensitize employees on compliance with the Data Protection Act and emerging trends.
- Conducting legal audits and having their organization's policies and procedures assessed by an independent legal practitioner.

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