



# EMBELLISH

The Lawyer of the Future

**DO NOT USE MY PHOTO  
WITHOUT MY CONSENT!**

**By Caroline Kimani**

**On 26<sup>th</sup> September, 2023**, the Office of the Data Protection Commissioner (ODPC) issued several penalty notices. Notably, Roma School was fined Kshs. 4,550,000/= for posting pictures of minors without their parents' consent. Casa Vera Lounge, a restaurant, was fined Kshs. 1,850,000/= for posting a person's image (referred to as a reveler in the notice) on their social media platform without the person's consent. Consequently, this has followed organizations informing people that their photos will be taken and posted and them deeming this as enough consent to post the said photos.

This article will delve into two issues; The likely procedural impropriety occasioned by the ODPC as well as the issue of consent in taking of photographs. On procedural impropriety, section 58 of the Data Protection Act (The Act) provides for an enforcement notice that can be issued to anyone whom the Data Commissioner deems to have failed to comply with the provisions of the Act. If still the entity is in breach even after being issued with the enforcement notice, the Data Commissioner can proceed to issue a penalty notice. If there was no enforcement notice issued, then this would mean that there was procedural impropriety.

The second issue regarding procedural impropriety relates to the contents of the penalty notice. Regulation 20 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 provides that a penalty notice should contain the names and addresses of the intended recipient, reasons for the intended penalty, the administrative fine imposed, details on how the fine is to be paid and the right of appeal as provided for under the Act.

From a cursory glance at the notice, the addresses of the recipients have not been included, details as how the fines are to be paid as well as whether the recipients have a right to appeal. It leaves the question as to whether these institutions will challenge the likely procedural impropriety occasioned by the ODPC

I will now look into the consent issue. There appears to be no set laws regarding image rights in Kenya. The court has largely relied on rights to privacy provisions. A case example is **Jessicar Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR** where Judge Mativo relied on Article 31 of the Constitution of Kenya to state that 'any form of intrusion of

personal life by any means such as photography' can be deemed a breach of the rights to privacy.

The court in the case of **Kamande v Nation Media Group (Constitutional Petition E004 of 2021) [2022] KEHC 16017 (KLR) (1 December 2022)**, held that where an image is taken and used for commercial gain or publicity, then the person's consent must be sought. In the case of **Wangechi Waweru Mwende versus Tecno Mobile Limited & Another**, the court held that consent should be explicit. In this case, the Plaintiff had been tagged on a video that her image was on and the Defendant interpreted that to mean consent for use of image. The court held that tagging cannot amount to seeking consent as this was sought after the fact. To further explore the issue of consent, in the matter of **FAF (suing on her own behalf and as a next friend of SAS and NAMS) v Norwegian Refugee Council [2019] eKLR**, the court held that just because the Petitioner's body language appeared to want a photo taken of her does not mean that she had consented to the same photo being circulated widely in a pamphlet.

In light of the foregoing, consent should be explicit. Just because one is comfortable with a photograph being taken of them does not mean that they are okay with the same being circulated. We must need to look at the cultural issue that hugely pervades this country in that we do not allow people the space to just say no or yes. Where does law meet with culture?

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