



LEGAL TAKE

DATA PRIVACY & VICARIOUS LIABILITY

The ODPC finds Safaricom PLC not liable for data breach by its employee.



Alfred Nyaga
Paralegal



Vanessa Mugo
Paralegal

On 3rd October 2023, the Office of the Data Protection Commissioner (the ODPC) delivered a landmark determination in ***Pauline Muhanda t/a Mudeshi Muhanda & Co. Advocates v. Safaricom PLC***. Up for determination was the issue of vicarious liability of employers in the enforcement of the provisions of the Data Protection Act, 2019 (**"the Act"**).

Factual Background.

The ODPC received a complaint dated 11th July 2023 where Pauline Muhanda, the Complainant, and an Advocate of the High Court of Kenya, allegedly discovered through an application filed in court that her law firm and herself have been under private investigation which resulted in a third party accessing her firm's and her individual MPESA statements without her express consent.

In response, Safaricom PLC, the Respondent objected to the jurisdiction of the ODPC to hear and determine the complaint by stating that the complaint had already been settled by ODPC. The Respondent also averred that they had put in place technological and organizational measures to eliminate and minimize data breaches including implementation of policies such as Acceptable Usage Policy, Disciplinary Policy and Procedure, Safaricom Data Protection Policy, and Safaricom Information Security Policy. The Respondent further stated that they had put in place elaborate sanction mechanisms which includes undertaking disciplinary processes and/or reporting an employee who is liable for data breach to the authorities for prosecution.

Analysis & Determination

In making its determination, the ODPC highlighted the following issues and analyzed them below:-

Whether the ODPC has jurisdiction to hear and determine the complaint

The parties requested for a chance to pursue alternative dispute resolution (“ADR”). The ODPC granted this request but the parties failed to reach a settlement. Consequently, the ODPC proceeded to lodge investigations on the complaint pursuant to Sections 5 and 6 of the Act which empowers the ODPC to protect the privacy of data subjects as enshrined in Article 31 of the Constitution of Kenya 2010. Therefore, the jurisdiction of the ODPC cannot be deemed to have expired as the complaint was not settled through the ADR process requested by the parties.

The ODPC also noted that the complaint could not be considered as already determined, or res judicata, as it did not meet the set threshold for determining res judicata. The ODPC relied on the case of **Christopher Kenyariri vs. Salama Beach (2017) EKL** where the court set the conjunctive elements of res judicata as follows;

- a) the suit or issue was directly and substantially in issue in the former suit,
- b) the former suit was between same parties or parties under whom they or any of them claim,
- c) those parties are litigating under the same title,
- d) the issue was heard and finally determined; and
- e) the court was competent to try the subsequent suit in which the suit is raised.

The ODPC was of the view that the complaint did not meet the legal criteria above as the ODPC did not render any prior determination with respect to the complaint.

Whether the Respondent was vicariously liable for its employee’s conduct under the Data Protection Act?

Vicarious liability applies where an employer is liable for any actions of their employees done within the scope of their employment. However, the employer is not liable for any activities outside the scope of the employee’s duties or where the employee goes on frolics and detours in the course of their work. It is on these exceptions of vicarious liability that the Respondent sought shelter.

In analyzing the extent of the vicarious liability of the Respondent, the ODPC heavily relied on the determination of the UK Supreme Court in the case of **WM Morrison Supermarkets plc v. Various Claimants (2020) UKSC 12** where the court highlighted the need to distinguish between situations when an employee is working to advance their employer's business, albeit inadvertently, and situations where the employee is working only to serve his or her own interests.

Considering the above, the test for vicarious liability is whether there was **sufficient close connection** between the work the employee was authorized to do, and the wrongdoing carried out so that the wrongdoing could fairly be regarded as furthering the work of the employer.

In this case, the employee, a customer care agent's role was extracting MPESA statements at the request of various data subjects. However, the employee assumed the role of data controller and shared the Complainant's personal data with a third party without following the Respondent's proper procedure and without the express consent from the Complainant.

The ODPC found that while there was a close link between her duties and the actions she took, the agent failed and/or ignored the Respondent's data sharing procedures. On this basis, the ODPC found Safaricom PLC not vicariously liable for her actions since they did not satisfy the close connection test.

Whether the Respondent fulfilled its obligations under the provisions of the Act

The Respondent, being a data controller as defined in Section 2 of the Act, is obliged to ensure that data subjects' data is processed in accordance with their right to privacy - that includes the right not to have personal data disclosed to unauthorized third parties. Further, by dint of Section 41 of the Act, to implement data protection principles by implementing appropriate technical and organizational safeguards.

The ODPC commented that the Respondent is a large handler for the personal data it collects and that for that reason it should be held to a **greater standard of obligation** in data protection with corresponding technical and organizational measures. The Respondent was able to demonstrate that it has taken appropriate measures including enacting policies and mechanisms to ensure that the personal data of their customers is safe and secure.

The Respondent also relied on the fact that the breach by their agent was reported to the authorities in accordance with Section 72(3) of the Act that criminalizes obtaining access to personal data without the consent of the data controller. On this issue it was raised that section 72(4) exempts employees or agents of a data controller acting within the scope of their mandate. However, the ODPC noted that the agent's actions deviated from the confines established by the Respondent and thus personal, rather than vicarious liability attaches. Thus found, the ODPC found the Respondent compliant with the obligations of data protection principles as per the Act, making a recommendation for the prosecution of the employee under Section 72(3) of the Act and the attendant Regulations.

Conclusion

While this decision clarifies Kenyan practice regarding employee actions that could lead to a data breach, it does not relieve an employer's obligation under Section 41 of the Act to make sure that it takes the necessary organizational and technical measures to uphold the data protection principles. Employers should therefore be mindful of the fact-specific nature of this decision by the ODPC and ensure that there is no room for complacency when it comes to making sure that the proper measures are taken to safeguard personal data and avoid employee data breaches. Notwithstanding, employers may derive some comfort in this decision as they navigate a fairly new area for many businesses and organizations with respect to data privacy law.

This article is for informational purposes only and does not constitute actionable legal advice. In case of any query in respect to a specific matter, please contact a lawyer or reach out to our team at consult@fmcadvocates.com.

PUBLISHED BY



FMC ADVOCATES

2nd Floor, Left Wing
The Crescent, Off Parklands Road
Westlands
Nairobi - Kenya
www.fmcadvocates.com

© ALL RIGHTS RESERVED

This article is for informational purposes only and does not constitute actionable legal advice.
In case you require specific advice on a matter that concerns you, please speak to a lawyer.