



KENYA PRIVACY LAW REVIEW



CASE DIGEST SERIES

CASE DIGEST
NO.

001

GRAIN INDUSTRIES LIMITED v E.M. & OFFICE OF THE DATA PROTECTION COMMISSIONER

[2024] KEHC 14003 (KLR)

Civil Appeal E186 of 2024

High Court of Kenya at Mombasa

12 November 2024



CONSENT



LIKENESS



PURPOSE
LIMITATION



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“ Protecting personal data. Upholding dignity. Strengthening digital trust. ”



CASE DIGEST · KPLR 001

VOLUME I · DIGEST NO. 001 · PART I: CONSENT, LIKENESS & PURPOSE LIMITATION

GRAIN INDUSTRIES LIMITED v E.M. & OFFICE OF THE DATA PROTECTION COMMISSIONER

[2024] KEHC 14003 (KLR) · Civil Appeal E186 of 2024
High Court of Kenya at Mombasa · Hon. J. K. Ng'arung'ar J. · 12 November 2024
On appeal from ODPC Complaint No. 387 of 2024

THE CASE AT A GLANCE

FORUM	High Court of Kenya at Mombasa — Civil Appeal
OUTCOME	Appeal dismissed; Commissioner's determination upheld in full
COMPENSATION	KES 1,000,000 (upheld)
CORE QUESTION	Whether an intermediary's consent may substitute for the data subject's consent

PRINCIPAL DOCTRINE

Consent to the commercial use of personal data must be attributable to the data subject herself; a controller may not rely on consent obtained from another person in relation to her image.

BRIEF FACTS

GRAIN INDUSTRIES LIMITED used E.M.'s photograph, without her consent, on billboards along the Mombasa–Malindi Highway, including the Nyalı and Kibarani areas of Mombasa and the Likoni area of Kilifi County, and in YouTube and social-media advertising captioned “*Tunashukuru mama wa Ajabu.*” She came upon the billboard herself, in the course of her ordinary daily activities, on or about 30th August 2023; the image had reached the company indirectly, through a marketing arrangement made separately by her adult daughter.

On her complaint of 6th March 2024, the *Data Commissioner's officers* inspected the sites, confirmed the billboards had since been removed, and *found the use unlawful for want of the Respondent's own consent*, together with *violations of her rights to be informed and to erasure*. She was awarded KES 1,000,000 in compensation, and an enforcement notice was issued.

Grain Industries appealed, contending among other things that the *determination had issued outside the statutory period*, that it had been *denied an opportunity to respond to the Respondent's rejoinder*, and that her adult *daughter ought to be treated as a relevant data controller in her own right*.

ISSUES

1. *Whether the Commissioner violated Grain Industries' procedural and fair-hearing rights.*
2. *Whether the Commissioner's determination was issued within the statutory period.*
3. *Whether Grain Industries unlawfully processed the Respondent's personal data.*
4. *Whether Grain Industries had complied with its obligations under the Data Protection Act.*
5. *Whether the compensation awarded was justified.*

HOLDING

Appeal dismissed. The High Court upheld the Commissioner's determination in full, findings on the rights to be informed and to erasure, and on **unauthorised commercial use**; together with the **KES 1,000,000 award**. Neither the procedural nor the limitation-period objection warranted disturbing it; the Court held consent must be connected to the actual data subject, not by proxy

COURT'S REASONING

Commercial use of the Respondent's image was processing of her personal data, requiring a lawful basis tied to her as the data subject. That the photograph reached the company through her daughter did not, without more, establish her own authorisation.

A family, agency, or intermediary relationship does not by itself establish the data subject's consent: authorisation must be traceable to her, and to the specific processing undertaken.

RATIO DECIDENDI

A controller using an individual's image commercially must establish a lawful basis attributable to that individual. An intermediary's consent, absent proof of authority to bind the data subject, is no substitute.

SIGNIFICANCE

Binding on advertisers and marketers using personal likenesses: consent is personal to the data subject, and lawful possession of an image confers no automatic authority to repurpose it commercially.

KEY TAKEAWAY

Possession of an image, or an intermediary's consent, is not consent from the person depicted. Demonstrate your own lawful basis for the specific commercial use.

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