

Significant Legal and Regulatory Developments for the period October- November 2024 Dated as of 29th November 2024

HIGHLIGHTS

- The Office of the Data Protection Commissioner has issued a landmark decision underscoring the importance of Data Processors and/or Data Controllers to obtain explicit consent from data subjects before engaging in direct marketing activities;
- The High Court has issued conservatory orders staying a notice from the Communication Authority, following concerns on mass surveillance and the need for data protection;
- The Employment and Labour Relations Court (ELRC) has delivered a judgment emphasizing on the necessity for employers to clearly state reasons for termination in employment termination letters;
- CBK foreign reserves increases to 4-year high;
- Government of Kenya seeks to reintroduce Carbon Tax.

1. ODPC Complaint No.0740 of 2024 Consolidated with ODPC Complaint No.0779 of 2024- Aluo Jane Njoki & Teresa Mutindi Munywoki Versus Spoton Vacations Limited

Citation

In the present case, the 1st and 2nd Complainants filed a complaint with the Office of the Data Protection Commissioner (ODPC) against the Respondent. Their complaint centered around the Respondent's sending of unsolicited promotional and direct marketing messages. The complainants emphasized that they had never given explicit consent for their personal data to be used for marketing or promotional purposes. Additionally, despite the 2nd Complainant exercising her right to object, the messages persisted, thereby violating her right to prevent the processing of her personal data.

The ODPC, delineated 2 key issues for determination:

1. Whether the Respondent fulfilled its obligation under the Data Protection Act, 2019;
2. Whether the Respondent infringed on the rights of the Complainants as a result of its actions.

Decision/Analysis

In assessing whether the Respondent fulfilled their obligations under the Data Protection Act (DPA), the ODPC based its findings on Section 37 of the DPA, which explicitly prohibits the use of personal data for commercial purposes without explicit consent from the data subject, unless authorized by law.

The ODPC established that the act of sending promotional messages to the Complainants constituted direct marketing, as defined under Regulations 14(1) & 14(2) of the Data Protection (General) Regulations, 2021. The ODPC emphasized that for such data processing to be deemed lawful, the Data Controller or Processor is mandated to:

- Notify the data subject that their personal data will be used for direct marketing;
- Implement a mechanism that allows a data subject to opt-out;
- Obtain explicit consent from the data subject;
- Ensure the data subject has not made an opt out request.

The ODPC also highlighted the requirements of the opt-out mechanism under Regulation 16, stressing that it should be simple, clear and free of charge or involve minimal cost. The ODPC established that the Respondent neither informed the Complainants that their personal data was being collected for direct marketing nor acquire their explicit consent.

Further, the lack of an opt-out mechanism, intimated the failure on the Respondent to fulfill its obligations under the Data Protection Act. It was also established that the Respondent violated the 2nd Complainant's right to object to the processing of their personal data. As a result, the ODPC concluded that the Respondent unlawfully processed the Complainants' data and was found liable.

- From the foregoing, the ODPC directed the Respondent to compensate the Complainants as follows:
- 1st Complainant: KES 200,000;
- 2nd Complainant: KES 450,000

Implications

- The decision reinforces the necessity for businesses to seek and obtain explicit consent from data subjects before processing personal data for marketing purposes. Further any data processor or controller should clearly inform individuals of the purpose of data collection, especially when it involves direct marketing. Failure to disclose this information is likely to invite legal implications;
- The decision further highlights the importance of providing easily accessible opt-out mechanisms for data subjects. Businesses therefore must implement clear and straightforward processes that allow individuals to withdraw their consent without imposing undue burdens on them;
- The decision is an invitation to businesses to familiarize themselves with the Data Protection Act, 2019 to ensure compliance in their marketing strategies;
- Businesses may need to reassess their direct marketing strategies to align with legal requirements. This may include adopting more ethical marketing practices that ensure consumer privacy.
- Businesses should develop robust data management policies that prioritize data protection and adhere to the principles of the Data Protection Act.

2. Katiba Institute vs State Law Office and Kenya Revenue Authority and 1 Other HCCHPRET/647/2024

On 22nd November 2024, the High Court of Kenya issued Conservatory Orders suspending the implementation of a notice by the Communication Authority of Kenya (CAK) titled "Enhancing Tax Compliance of Mobile Devices in Kenya," as well as a subsequent notice by the Kenya Revenue Authority (KRA), until 18th December 2024. The orders followed a petition filed by the Katiba Institute, challenging the CAK and KRA's directive requiring visitors to Kenya and all phone dealers to submit IMEI codes for both imported and locally assembled phones.

According to the notice shared by CAK, all passengers entering Kenya were to declare their mobile devices on the F88 passenger declaration form before proceeding with their activities. The Communication Authority justified the directive, stating its purpose was to ensure tax compliance and promote market integrity.

Decision/Analysis

Katiba Institute, in its petition, argued that this move would unlawfully enable mobile phone providers to track an individual's location and access their communication history. The Institute contended that, without proper safeguards, this would amount to mass surveillance, allowing the government to monitor people's movements and calls in unprecedented ways.

The petitioners contended that the requirement to declare IMEI numbers was problematic because IMEI numbers are personal data. They further argued that this mandatory disclosure could discourage Kenyans from purchasing SIM cards from local mobile providers. Additionally, the petitioners claimed the directive violated the Data Protection Act, 2019, by coercing individuals into providing their personal data under duress, as it threatened to deregister mobile phones without IMEI disclosures.

The petitioners also highlighted that the move could infringe on several constitutional rights, including the freedom of expression and the freedom of movement. Furthermore, they argued that the Respondents had failed to provide sufficient safeguards regarding the collection and use of IMEI data, such as who would have control over the database, who would access it, what security measures were in place, and how individuals could seek remedies if aggrieved by the data collection process.

Implications

In the event the Court lifts the conservatory orders and decides in favour of the Respondents,

the move by The Communication Authority is likely to pose a risk to individual freedoms.

- Mobile service providers may face increased scrutiny regarding their data handling practices.
- The Outcome of this decision may result in investors reassessing the risks associated with operating in Kenya particularly in industries, related to technology and telecommunications.
- A decision in support of The Communication Authority's move is likely, to raise concerns about state overreach and surveillance.

3. *Kagai v Kenga Equatorial Hotels Limited t/a Mombasa Continental Resort (Cause E021 of 2022)* [2024]KEELRC2641 (KLR) (25 October 2024) (Judgment)

Citation

The Claimant was an employee of the Respondent. The Respondent terminated the Claimant vide a letter without indicating the reasons for termination, forming the subject of the claim before the Court.

The crux of the matter before Court was whether the termination of the Claimant's employment was unfair. In responding to this question the Court held that for one to conclude that a termination is unfair, one needs to look into the substantive and procedural test, a two part, conjunctive test

Facts

- With regards to the substantive test, the Court emphatically stated that the law obligates employers to demonstrate that there was a valid reason for terminating an employee's contract. Additionally, the Court held that procedural fairness requires employers to demonstrate that the procedure that they adopted in terminating the employee's employment was fair. The absence of these two will lead the Court to conclude that the termination was unfair.
- The Court concluded that the termination letter issued to the Claimant by the Respondent

did not highlight the reasons for termination and therefore the Respondent could not appear before Court later and introduce reasons which were not expressly indicated in the termination letter.

- The Court echoed the provisions of the Employment Act stating that in employment contract termination cases, the onus is on the employer to substantiate the grounds for termination of the contract and in the event that he fails to do so the termination shall be deemed as unfair.
- The Court emphatically stated that where a letter of termination of employment is issued by an employer, reason(s) must be stated in the letter. The Court went further to state that it is those reasons whose validity would be required to be proven in any claim arising out of termination of contract.
- The Court stated that an employer who fails to highlight clearly the reasons for termination of employment in the letter of termination issued to an employee cannot be allowed to come up with “reasons” after a claim is filed challenging fairness of his termination.

adheres to fair procedures. Failure to meet either requirement may result in the termination being deemed unfair;

- Employers cannot introduce reasons for termination after the fact. Where the reasons are not included in the termination letter, they cannot be used in court to justify the dismissal.

Implications

- Employers are called to explicitly highlight the reasons for termination of employee’s contract in their termination letters and that absence of or vague reasons will invite legal suits regarding fairness of termination of employment;
- The decision reinforces the necessity for both substantive and procedural fairness when terminating employment. Further, Employers must ensure that there are valid grounds for termination and that the process followed adheres to fair procedures. Failure to meet either requirement may result in the termination being deemed unfair;
- Employers cannot introduce reasons for termination after the fact. Where the reasons are not included in termination letter, they cannot be used in court to justify the dismissal;
- The decision reinforces the necessity for both substantive and procedural fairness when terminating employment. Further, Employers must ensure that there are valid grounds for termination and that the process followed

POLICY AND ECONOMIC UPDATES

News

CBK Foreign Reserves hit a High in four years

Brief facts/ Analysis

Kenya's official foreign reserves at the Central Bank of Kenya (CBK) have scaled their highest level in four years. The data from CBK intimates that the reserves rose by KES 95 billion to KES.1.204 trillion as of 14th November 2024 from KES.1.109 trillion. This increase is attributed to disbursements of KES.78.3 billion from the International Monetary Fund (IMF) on 30th October 2024 which was credited to CBK's accounts together with CBK's dollar purchases.

Implications

The size of official reserves serves as confidence signal to potential investors in the Country and rating agencies.

News

Reintroduction of Carbon Tax

Brief facts/ Analysis

Kenya is seeking a helping hand from the International monetary Fund to reintroduce a Carbon tax. The IMF role in this is to single out products that would potentially be taxed.

Kenya is also rethinking of introducing an Emissions Trading System (ETS) a cap-and-trade system that allows industries with low emissions to sell their extra allowances to larger emitters. Environmental groups are in support of the Carbon tax as the same will cut the Country's emissions as well as help in raising revenue for the government. The IMF has however made a warning indicating that the implementation of the Carbon Tax will need to be complemented with a strengthened social safety net to protect the most vulnerable sections of the population.

Implications

- Industries that produce high levels of carbon emissions will face increased operational costs due to tax. This could lead to higher production costs, which may be passed on to consumers through increased prices for goods and services;
- The Carbon Tax and ETS are designed to incentivize industries to adopt more sustainable practices and technologies that reduce emissions. companies may need to invest in cleaner technologies which could lead to innovation and improved efficiency in the long term;
- Industries that produce high levels of carbon emissions will face increased operational costs due to the tax. The ripple effect of this will be higher production costs, which may be passed on to consumers through increased prices for goods and services.

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