



ADRIAN KAMOTHO NJENGA & COMPANY ADVOCATES

OUR REF: AKN/V1/157/2021 YOUR REF: TBA

DATE: 4th February 2021

Ms. Immaculate Kassait,
Data Commissioner,
Republic of Kenya,
Communications Authority Center,
Ground Floor,
Waiyaki Way, Westlands,
P.O. Box 30920, 00100
Nairobi.



COMMUNICATIONS
AUTHORITY OF KENYA
P. O. Box 14448 - 00800, NAIROBI

05 FEB 2021

RECEIVED

Ref. No: *Adworo 5/2/2021*
OFFICE - LEGAL SERVICES

Dear Ms. Kassait,

RE: SUBSCRIBER DATA BREACH BY SAFARICOM PLC

Receive warmest compliments from our client Adrian Kamotho Njenga, a law abiding citizen of the Republic of Kenya, who has instructed us to address you as hereunder, on the referenced subject:

On 7th June 2019, two Safaricom employees namely; Simon Billy Kinuthia and Brian Wamatu Njoroge were arrested and subsequently charged with various data breach offences in Nairobi Chief Magistrate's Court Criminal Case No. 962 of 2019. Further, Safaricom proceeded to institute Civil Case No. 194 of 2019 in the High Court at Nairobi against the said employees.

From all available evidence and in all pleadings lodged in court by Safaricom and other dueling parties, it is outwardly visible that confidentiality, privacy and security of subscriber data, lawfully entrusted to Safaricom PLC remains in perpetual breach. Personal data of millions of Safaricom PLC subscribers has been variously transferred from Safaricom servers to publicly accessible Google drive repositories as well other devices outside Safaricom's control, and continues to-date, to be unlawfully exposed.

Self-evidently, the subscriber data has been irregularly subjected to analytical and data mining scripts in a manner not sanctioned by law. As acknowledged by Safaricom on multiple instances, the said data which is no longer under its safe custody and control, continues to be randomly shared and offered for sale, contrary to express contractual and statutory duty to keep the data confidential, private and secure.

Section 27A (2) (c) of the Kenya Information and Communications Act, 1998, requires registration details of a subscriber to be kept in a secure and confidential

manner, and not to be disclosed without the written consent of the subscriber. The right to privacy as constitutionally bestowed, is not negotiable and cannot be diminished by corporate laxity, technical malaise or organizational ineptitude. Neither can employee culpability absolve Safaricom from liability, when data of over 11.5 million subscribers remains persistently unaccounted for.

Clause 4 of the M-Pesa Customer Terms and Conditions unequivocally binds Safaricom to protect the privacy of all information provided by users of M-PESA. Also, in its Data Privacy Statement, Safaricom guarantees technical and operational measures to protect subscriber information from unauthorized access, accidental loss or destruction. Viewed within the current reality, the foregoing is a hollow undertaking. As such, the statement is a false, misleading or deceptive representation within the meaning of section 12 of the Consumer Protection Act, 2012 and proscribed under section 15 of the same Act.

Regulation 4 of the Kenya Information and Communications (Consumer Protection) Regulations, 2010 mandatorily requires Safaricom to take appropriate technical and organizational measures to safeguard the security of its services. Where there is a particular risk of a breach of the security of the network, Safaricom is duty bound to inform the subscribers of the risk; and where the risk lies outside the scope of the measures taken, of any possible remedies, including an indication of the likely costs involved. (Emphasis Supplied)

Section 43 of the Data Protection Act, 2019 dictates that, where personal data has been accessed or acquired by an unauthorized person, and there is a real risk of harm to the data subject whose personal data has been subjected to the unauthorized access, the Data Commissioner should be informed within seventy-two hours of the data controller, becoming aware of such breach. In addition, Safaricom is under obligation to communicate to the data subject in writing without delay. (Emphasis Supplied)

Despite the grave and persistent data breaches, Safaricom is yet to comply with the constitutional and statutory provisions relating to data protection and the right to privacy. The foregoing acts constitute a severe infringement of our client's rights and those of the wider public enshrined under numerous provisions of the law.

In light of the foregoing information, our client hereby approaches your good office for reprieve. Without doubt, the tools needed to secure the rights of our client are truly in your hands. Section 8 (1) (a) of the Data Protection Act, 2019

confers upon you the mandate to oversee the implementation of and be responsible for the enforcement of the said Act.

Section 8 (1) (f) of the Act empowers you to receive and investigate any complaint by any person on infringements of the rights under the Act. In deed section 8 (1) (f) of the Act authorizes you to perform such other functions as necessary for the promotion of object of the Data Protection Act, 2019, and to give proper effect to Article 31(c) and (d) of the Constitution.

Confident that you will meticulously address the matter herein, to the fullest extent of the law, we assure you of our highest regards and look forward to hear from you at the earliest, and in any event, within the next fourteen (14) days.

Yours faithfully,

ADRIAN KAMOTHO NJENGA & CO. ADVOCATES

