



Regulation of Cross Border Data Transfers

Law and Reality: Examples from Kenya

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Introduction

- In January 2020, Kenya had over 22.8 M Internet users (internet penetration standing at 43%).
- In the same period, social media users stood at 8.8 M.
- The number of mobile connections stood at 52.06 connections (a number of Kenyans have more than one sim card).
- The uptake of Over-The-Top (OTT) applications such as Whatsapp and Facebook Messaging continues to be on the rise.
- Some of the popular apps include betting and mobile loan apps.



Intro- Cont.

- With this great internet penetration, Kenyans are increasingly using smartphones to access the internet.
- These gadgets ubiquitously track and generate personal data. They also facilitate numerous applications (apps) provided by third party developers.
- The apps depend on analysis of personal data of the mobile user to offer their services.



- A recent study on data and privacy concerns of digital lending apps by Strathmore University found that the digital lending apps are the most downloaded.
- Over 150 of them though around 10 are the highly utilized ones.



Realities

- Ireland's Data Commissioner early in the week indicated that a dataset, seeming to be sourced from Facebook, appeared on a hacking website.
- Contains records of 533 million individuals.
- Meaning that there has been breach of data which is located across borders.
- What do different data protection laws provide for the protection of its citizens?



Realities...Cont.

Localization of global apps:

- Some apps appear to be local by virtue of their local names especially those whose names are in Swahili.
- Examples include Sportpesa (meaning “Sportmoney”). This is a betting app mainly for football games and which is very popular. It is registered in Kenya, but is a subsidiary of a company registered in the UK.

Localization of global apps...

- Tala, formerly Mkopo Rahisi (meaning "easily in hand") is registered in California
- Jumia (similar in sound to "Jumuia" meaning "community") is registered in Germany.
- Others are Sendy (transport and logistics app) discloses that its data will be transferred, processed and stored in the Republic of Ireland meaning that it is also registered in Ireland.
- International apps such as Truecaller provide for contacts in India while Bolt is registered in Estonia.

Data transfer Concerns

- The assumption is that there is data protection regulation in the country of registration of the company/app or where the data resides.
- Globalization and localization dictates the standards for data protection and privacy in terms of where data is processed and stored, and therefore governed.

Concerns...

- All the apps read contacts, location data and have access to network connectivity data.
- The digital lending apps inform borrowers that their identity and phone numbers have been verified.
- The apps share with third parties data obtained from their clients.
- A majority of internet users in Kenya have little or no knowledge of the implications of giving their data when they download some of the apps, and are not aware that their data is stored across borders.
- They unknowingly grant power over their data, their online transactions and communications to foreign apps and intermediaries.

Concerns...

- How is this data used?
- The period within which data shall be retained: is it when a user has an account with them or as is required by law?
- For the apps operating locally but with registration in foreign countries, it is not clear whether data in their custody can be transferred outside of their jurisdiction.

What Kenya's Data Protection law provides

- The government enacts robust legislation to secure the rights of users, and oversee the policies and practices of intermediaries.
- There is the Data Protection Act of 2019.
- Kenya's 1st Data Protection Commissioner has been in office for slightly over 100 days.
- The Act gives effect to Article 31(c) and (d) of the Constitution on the right to privacy.
- Regulates the processing of personal data; the rights of data subjects and, for the obligations of data controllers and processors.
- Specifies the obligations of the data controllers and processor
- Designed to bring the protection of personal data from misuse
- Facilitates lawful use of personal data.

Provisions...

- In Part iv—**principles and obligations of personal data protection**
- 25 (h) not transferred outside Kenya, unless there is proof of adequate data protection safeguards or consent from the data subject.
- **Part vi —transfer of personal data outside Kenya**
- Only where safeguards with respect to the security and protection of the personal data has been demonstrated to the Data Protection Commissioner.
- (b) proof to the Data Commissioner of the appropriate safeguards with respect to the security and protection of personal data, and the appropriate safeguards including jurisdictions with commensurate data protection laws;
- (c) the transfer is necessary —**performance of a contract, performance of a public interest.**
- (where the data subject is ignorant?)

Possible suggestions

- Most of these apps are data controllers.
- Clarity on who processes a user's data, whether local or where the app is registered is key.
- **Fintech apps: Is it possible** for some of these apps that cut across borders and whose policies and practices largely foster their business interests to also focus on protecting the users data?
- Need for data minimization for example the digital lending apps that harvest borrowers' data.
- Be more open, produce annual transparency reports relating to how user data is handled, used and protected, and educate their users?
- Sensitization/awareness for users of apps to know that their data is moving across borders when they use some of the apps? So that there is informed consent?



Thank you!