



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**DIVORCE CAUSE NO. 1 OF 2013**

N D M.....PETITIONER

VERSUS

P N M alias P S R.....RESPONDENT

**JUDGMENT**

The petitioner **N D M** filed in court this petition dated 5<sup>th</sup> January, 2013 seeking the dissolution of his marriage to the respondent **P S R**. The respondent who lives in India was duly served with both the petition as well as the summons. However she failed/declined to enter appearance and/or to file a response to the petition. The matter therefore proceeded as an undefended cause.

In his evidence the petitioner told the court that he met and married the respondent through a civil marriage on 10<sup>th</sup> January, 1999. After this marriage the two returned to Kenya and underwent a Hindu religious ceremony on 11<sup>th</sup> December, 1999 in Mombasa. The relevant marriage certificates have been exhibited in court. The couple then set up their matrimonial home in Mombasa. Their union resulted in one child a daughter named 'D' who was born on 5<sup>th</sup> September, 2003. They lived together experiencing the normal ups and downs of married life. The petitioner worked as a Naval officer and the respondent worked as a legal assistant in a law firm. In December, 2011 the respondent left to India ostensibly to visit her family. She did not return to Kenya as expected. Upon enquiry she informed the petitioner that she had no intention of returning to Kenya and that she had no desire to remain married to him. The petitioner had to take up the role of both father and mother to their daughter. He has therefore filed this petition seeking a divorce.

The law regarding marriage and divorce is contained in the Matrimonial Causes Act, Cap 152 Laws of Kenya. Section 6(1) of the said Act provides that

**“No petitioner shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of the marriage.”**

In this case the couple got married in 1999. The present petition was filed in January, 2013, a full fourteen (14) years after the marriage. I therefore find that this petition fulfils the requirements of section 6(1) of the Marriage Act and is properly before the court.

Section 8(1) of Cap 152 provides the grounds upon which a divorce may be granted. These grounds include both cruelty provided for by section 8(1)(c) and desertion provided for by section 8(1)(d).

The petitioner told the court that the respondent travelled to India in December, 2011 saying that she was going to visit her parents. She left behind their 8 year old daughter in Mombasa. What was intended to be a short visit has extended to more than two years since the respondent has declined to return to date. Upon the petitioner calling to enquire what was amiss, she told him that she had no intention of returning to Kenya. The evidence of the petitioner in this regard remains unchallenged and uncontroverted. In correspondence annexed to the petition, the respondent states that she has decided to remain in India in order to pursue a career and to look after her aging parents. These are valid reasons, but ones which required discussion and agreement with her spouse. The respondent ought to have sat down with the petitioner and discussed her intentions and/or desires so that the two could reach a consensus on the way forward. To make a unilateral decision of such magnitude without consulting one's spouse amounts to a total disregard of the marital union. Further the respondent abandoned her young girl child, forcing the petitioner to step into her role as a mother. This is not only cruel to the child but to the petitioner as well, who no doubt expected that they would raise their child together.

The petitioner has told the court that he has approached family and friends to persuade the respondent to return to her marriage to no avail. In December, 2013 he even travelled with the child to India in an attempt to persuade the respondent to return home but their entreaties fell on deaf ears. The respondent's actions do in my view amount to cruelty. She has denied the petitioner his right to consortium and has made him have to resign from his army career in order to give close attention to his daughter. It is clear that the respondent has totally turned her back on both her marriage and her daughter. A marriage cannot be said to subsist where one spouse insists on living on another continent. It is clear that this union has broken down. It would be unjust to compel the petitioner to remain shackled to a wife who has made it clear that she does not wish to remain in the union. I therefore allow this petition for divorce. Decree nisi to issue to be made absolute within three (3) months of today's date.

The petitioner has made a prayer for custody of the child of the marriage. This is a prayer which ought properly be heard and determined in the Childrens Court at the first instance. I therefore decline to make any substantive orders on custody save to direct that the present status quo with respect to the child shall remain in force pending any further orders from a court of competent jurisdiction. Lastly, I make no orders on costs.

**Dated and delivered in Mombasa this 26<sup>th</sup> day of March, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

Ms. Adagi for Petitioner

Court Clerk Mutisya